last page of docket
SHDKT PROCEEDINGS AND ORDERS DATE: [11/27/91]

CASE NBR: [91105087] CFY STATUS: [DECIDED]
SHORT TITLE: [Enriquez-Nevarez, Mario]
VERSUS [United States] DATE DOCKETED: [070991]
PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Jul 9 1991	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Aug 13 1991		Order extending time to file response to petition until September 11, 1991.
5	Aug 20 1991		Brief of respondent United States in opposition filed.
6	Aug 29 1991		DISTRIBUTED. September 30, 1991
7	Sep 12 1991	X	Reply brief of petitioner Mario Enriquez-Nevarez filed.
9	Oct 28 1991		REDISTRIBUTED. November 1, 1991
11	Nov 4 1991		REDISTRIBUTED. November 8, 1991
13	Nov 12 1991		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

****

*** Related Case - Use VIDE,LS with SE ***

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

91-5087 (2)

No._____

In The

Supreme Court of the United States

October Term, 1991

MARIO ENRIQUEZ-NEVAREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LUCIEN B. CAMPBELL
Federal Public Defender
Western District of Texas
727 E. Durango Blvd., B-207
San Antonio, Texas 78206
(512) 229-6700

Counsel of Record for Petitioner

HENRY J. BEMPORAD
Assistant Federal Public Defender
Western District of Texas

54 pp

QUESTION PRESENTED FOR REVIEW

Whether a pretextual traffic stop—*i.e.*, a stop made under facially legal authority but with the improper intent to search for evidence—is *per se* reasonable under the Fourth Amendment.

No. _____

In The

Supreme Court of the United States

October Term, 1991

MARIO ENRIQUEZ-NEVAREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Mario Enriquez-Nevarez respectfully prays that a Writ of Certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on April 10, 1991.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

Cases iv

Constitutional Provisions vii

Statutes vii

Rules vii

Other Authorities vii

OPINION BELOW 1

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE WRIT 7

I. THE FIFTH CIRCUIT FAILED TO FOLLOW THE PRECEDENT OF THIS COURT, AND HAS EFFECTIVELY DETERMINED THAT PRETEXTUAL SEARCHES ARE *PER SE* REASONABLE IN HOLDING THAT HEARINGS ARE NOT NECESSARY ON MOTIONS CHARGING PRETEXT. 8

II. THE COURTS BELOW ARE IN DISARRAY REGARDING THE STANDARDS FOR DETERMINING THE CONSTITUTIONALITY OF PRETEXTUAL SEARCHES. 13

III. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Amador-Gonzales v. United States,
391 F.2d 308 (5th Cir. 1968) 9

Bonner v. City of Prichard,
661 F.2d 1206 (11th Cir. 1981) (en banc) 14

Brown v. State,
738 P.2d. 1092 (Wyo. 1987) 16

Gordon v. State,
801 S.W.2d 899 (Tex. Crim. App. 1990) (en banc) 15

Henderson v. United States,
12 F.2d 528 (4th Cir. 1926) 14

Hines v. State,
289 Ark. 50, 709 S.W.2d 65 (Ark. 1986) 15

Horton v. California,
110 S.Ct. 2301 (1990) 17

Maryland v. Macon,
472 U.S. 463 (1985) 8

McKnight v. United States,
183 F.2d 977 (D.C. Cir. 1950) 13

Mincey v. Arizona,
437 U.S. 385 (1978) 17

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 16

People v. Anderson,
189 Ill. App. 3d 289,
523 N.E.2d 1034 (Ill. App. Ct. 1988),
cert. denied, 109 S.Ct. 1935 (1989) 15

Scott v. United States,
436 U.S. 128 (1978) 8, 9, 13

Smith v. Allwright,
321 U.S. 649 (1944) 16

State v. Blair, 691 S.W.2d 259 (Mo. 1985)
(en banc), *cert. dismissed*, 480 U.S. 689 (1987) 16

State v. Jeney,
163 Ariz. 293, 787 P.2d 1089
(Ariz. Ct. App. 1989) 15

State v. Law,
115 Idaho 769, 769 P.2d 1141
(Idaho App. 1989) 15

State v. Vann,
230 Neb. 601, 432 N.W.2d 810 (Neb. 1988) 15

Terry v. Ohio,
392 U.S. 1 (1968) 9, 10, 17

United States v. Cortez,
449 U.S. 411 (1981) 9

United States v. Causey,
818 F.2d 354 (5th Cir.),
rev'd on reh'g en banc, 834 F.2d 1179
(5th Cir. 1987) 5–7, 10–12, 16, 17

United States v. Crottinger,
928 F.2d 203 (6th Cir. 1991) 14

United States v. Cruz,
581 F.2d 535 (5th Cir. 1978) (en banc) 10, 14

United States v. Cummins,
920 F.2d 498 (8th Cir. 1991)
petition for cert. filed, No. 90–1029
(U.S. Apr. 11, 1991) 13, 15

United States v. Guzman,
864 F.2d 1512 (10th Cir. 1988) 12, 14, 15, 16

United States v. Hardy,
855 F.2d 753 (11th Cir. 1988) 14

United States v. Hawkins,
811 F.2d 210 (3d Cir.),
cert. denied, 484 U.S. 833 (1987) 14

United States v. Judge,
864 F.2d 1144 (5th Cir. 1989),
cert. denied, 110 S.Ct. 1946 (1990) 11, 12

United States v. Kordosky,
878 F.2d 991 (7th Cir. 1989),
vacated on other grounds, 110 S.Ct. 1943 (1990) 17

United States v. Lefkowitz,
285 U.S. 452 (1932) 8–10, 12, 13, 16

United States v. Lewis,
910 F.2d 1367 (7th Cir. 1990) 14

United States v. McCarty,
862 F.2d 143 (7th Cir. 1988) 14

United States v. Nersesian,
824 F.2d 1294 (2d Cir.),
cert. denied, 484 U.S. 958 (1987) 15

United States v. Smith,
802 F.2d 1119 (9th Cir. 1986) 13

United States v. Smith,
799 F.2d 704 (11th Cir. 1986),
cert. denied, 489 U.S. 1019 (1989) 14, 15

United States v. Tharpe,
536 F.2d 1098 (5th Cir. 1976) (en banc) 10

United States v. Villamonte-Marquez,
462 U.S. 579 (1983) 8

United States v. Whitfield,
629 F.2d 136 (D.C. Cir. 1980),
cert. denied, 449 U.S. 1086 (1981) 13

Warren v. City of Lincoln,
816 F.2d 1254 (8th Cir. 1987),
rev'd on other grounds, 864 F.2d 1436 (8th Cir.)
(en banc), *cert. denied*, 490 U.S. 1091 (1989) 13, 15

Constitutional Provisions

Fourth Amendment,
United States Constitution 1, 7, 9, 12, 14, 17

Statutes

18 U.S.C. § 2 4

18 U.S.C. § 2518(5) 9

18 U.S.C. § 3231 1

21 U.S.C. § 841(a)(1) 4

21 U.S.C. § 952(a) 4

21 U.S.C. § 960(a)(1) 4

21 U.S.C. § 963 4

28 U.S.C. § 1254(1) 1

Rules

Supreme Court Rule 10.1 8

Supreme Court Rule 13.1 1

Other Authorities

Amsterdam, *Perspectives on the Fourth Amendment*,
58 Minn. L. Rev. 349 (1974) 16

OPINION BELOW

The unpublished opinion of the court of appeals, styled *United States of America v. Mario Enriquez-Nevarez* and numbered Cause No. 90–8462, was entered on April 10, 1991. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 10, 1991. This petition is filed within ninety days after entry of judgment. SUP. CT. R. 13.1. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The basis for federal jurisdiction in the court of first instance was 18 U.S.C. § 3231.

On January 30, 1990, Albuquerque Police Department detective James Torres saw Petitioner arrive at a house where he and another officer were conducting surveillance. They followed Petitioner from this house to his residence in Albuquerque, from there to a hotel, and then to a bar called the Drift-in Lounge, where Petitioner met Rigoberto Castillo-Olivas (Castillo). Petitioner left the lounge in the blue van he had been driving; Castillo followed him in a blue and white Chevrolet pickup truck with Idaho license plates and a

broken tail light. The detectives followed the vehicles back to Petitioner's home, where Petitioner picked up a New Mexico license plate.

Later Petitioner and Castillo left together in the blue and white truck, with Petitioner driving, and travelled southbound on Interstate Highway 25. The officers followed Petitioner's vehicle for 60–70 miles in an unmarked car, and then contacted a New Mexico state patrolman to stop it. At the time they had the truck stopped, the detectives were outside of Bernalillo County, New Mexico, which is the county in which they had jurisdiction. When asked at trial why he did not stop Petitioner for the broken tail light earlier, detective Torres indicated that it was discouraged, but not prohibited, for officers in an unmarked vehicle to stop drivers. Torres further explained that they had expected Petitioner to go to a "stash" cite 30 miles outside Albuquerque, but that Petitioner had not driven to this location.

Petitioner was cited for driving with a defective tail light and for failing to produce a driver's license. The detectives arrived and asked for permission to search the truck. Officer Torres testified that Petitioner consented to the search, which revealed the presence of a New Mexico license plate under the front seat between Petitioner and Castillo. No narcotics or other incriminating evidence was found in the vehicle. The detectives asked Petitioner if there were narcotics in the truck. Petitioner responded that "people don't take narcotics south; they bring them in from Mexico." Petitioner also told the detectives that he was going to get a bumper and to get bottled sodas in Juarez, Mexico.

The officers believed that an illegal transaction had occurred between Petitioner and a resident of the house under surveillance. However, with the exception of driving with a

broken tail light, the officers had not observed Petitioner engaged in any illegal activity. Although the detectives told Petitioner upon stopping him that they knew he was a narcotics trafficker, no evidence was presented regarding any information the police had about prior criminal or drug-related activity by Petitioner.

On the morning of January 31, 1990, Petitioner, driving the blue and white truck, crossed the border from Juarez into El Paso, Texas at the Paso Del Norte point of entry. At the initial inspection station, United States Customs Inspector Roberto Rodriguez questioned Petitioner. Rodriguez questioned Petitioner as to citizenship and what items he had to declare; Petitioner presented his resident alien card and said that he had purchased a few cases of soda. Rodriguez escorted Petitioner to a secondary inspection station, where Petitioner was questioned by Customs inspectors Enrique Solorzano and Sigidfredo Cordero. Cordero searched the vehicle driven by Petitioner; after a full inspection, no contraband was found.

Castillo crossed the border driving the next vehicle in Inspector Rodriguez's lane, a white Chevrolet pickup, and Rodriguez questioned him at the primary inspection station. Rodriguez then inspected the gas tank through a crack between the bed of the truck and the cab, and noticed that the tank had been altered. When Rodriguez tapped the gas tank, it emitted a dull sound, "like there was something in there." Castillo was arrested, the gas tank was removed, and approximately 54 pounds of marihuana were discovered. Petitioner was also arrested. It was later discovered that the license plate on the pickup carrying the marihuana was the same one found in the search of the blue and white truck the day before. The ticket received by Petitioner during the earlier stop was found among Castillo's personal

effects.

Petitioner and Castillo were charged in a three-count indictment with (1) conspiracy to import marihuana, in violation of 21 U.S.C. § 963; (2) importing and aiding and abetting in the importation of marihuana, in violation of 21 U.S.C. §§ 952(a) and 960(a)(1) and 18 U.S.C. § 2; and (3) possessing and aiding and abetting in the possession of marihuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Both defendants pleaded not guilty, and they were tried jointly.

The jury was selected on June 18, 1990, and trial began on June 21, 1990. On the afternoon of June 20, 1990, the Government provided the defense with investigative notes regarding the stop and search of Petitioner's vehicle on the day before his arrest. Prior to trial on the morning of June 21, Petitioner filed a motion styled "Motion to Suppress or Motion in Limine C." See Appendix D. In the motion, Petitioner sought to suppress the license plate found in the truck on January 30, 1990 and his statements made to the police at that time. The motion to suppress argued that "any evidence obtained by New Mexico State police as a result of the stop and search of Defendant's vehicle on Interstate Highway 25" must be suppressed because the agents "had no reasonable suspicion or probable cause to stop the Defendant's vehicle," and because the stop was "pretextual." *Id.*

The proceedings on the record with regard to the motion to suppress were as follows:

> MR. PEREZ: Robert Perez for Mario Enriquez-Nevarez, we're ready pending the hearing of our motions.
>
> THE COURT: I don't know anything about any motions. What motions do you mean?
>
> MR. PEREZ: We have motions in limine, Your Honor. And yesterday the Government delivered to us some discovery we had not yet seen

> which dealt with the stop of my client's truck as he was heading south on I25, and it became very apparent from the discovery that we had for the first time that the stop was pretextual, so we filed a motion to suppress and/or a motion in limine concerning that stop, Your Honor.
>
> THE COURT: Well, why do you think pretext matters these days? Fifth Circuit changed the law on that.
>
> MR. PEREZ: I didn't run into any Fifth Circuit law, Your Honor. I ran into Eleventh Circuit and Seventh --
>
> THE COURT: What's the name of the case, "Causey"?[1] Is that the En Banc case that says no more pretext stop law?
>
> MR. MACIAS [the prosecutor]: I believe so. But it wasn't a pretext stop. There was a ticket issued.
>
> THE COURT: That's what I mean. If their real secret motive was just to investigate or something, as long as there was an actual event, a violation, and they issued a ticket for it, then that is the end of the story.
>
> MR. PEREZ: It would be one thing, Your Honor, except that the detectives who did the search were out of their jurisdiction at the time, and they had no reason to stop my client so they had a highway patrolman pull him over and then they pulled in behind and did the search.
>
> MR. GONZALES: If I might comment, Your Honor, there is virtual admission in the notes of the officers. The only thing that would make it more specific would be for them to have said that this is a pretext --
>
> THE COURT: Well, you have waited too late to bring all of this stuff up. As far as I am concerned, we're ready for the jury.
> What else do you have? You said something about motions.
>
> MR. PEREZ: May I say something for the record? We were unaware of the circumstances until yesterday afternoon.
>
> THE COURT: I have heard all of this before. I don't know why you were unaware of it, but I have heard all of it before -- at some hearing we had in this court, as a matter of fact.

---

[1]An apparent reference to *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987) (en banc).

MR. PEREZ: Your Honor, what we heard was that they were stopped, but we didn't know where or how it happened and --

THE COURT: You didn't investigate?

MR. PEREZ: We had no way to investigate that, Your Honor. It was in the hands of the Government.

THE COURT: What do you mean you didn't have any way to investigate it? Get serious. You are a clever criminal defense lawyer. You have all kinds of ways to investigate. Don't you have investigators on your staff.

MR. PEREZ: Yes, we do, Your Honor.

THE COURT: All right. That is ridiculous. What other motions do you have? I am getting ready to bring the jury in.

Appendix B. Upon conviction of all three counts, Petitioner was sentenced to twenty-seven months imprisonment and three years supervised release on each count, the sentences to run concurrently.

On appeal, Petitioner argued, *inter alia*, that the district court erred in failing to conduct a hearing on his motion to suppress. Petitioner contended that his motion was not untimely, because he had been provided with discovery giving rise to the motion on the eve of trial. He further argued that Fifth Circuit precedent on pretextual seizure law did not foreclose his motion.

The Fifth Circuit disagreed. It held that, because Petitioner had not challenged "either the factual basis for the stop, a broken tail light, or the legal authority in New Mexico for a stop on that basis," his allegations did not raise an issue of fact, and "the district court correctly applied *Causey* and did not abuse its discretion in failing to conduct

a hearing on the motion." Appendix A, at 7.[2]

Petitioner also raised a claim that insufficient evidence was presented against him. The Fifth Circuit held that the evidence was sufficient to support the convictions, and specifically found that the ticket issued during the New Mexico stop, and the license plate and statements obtained by the Albuquerque detectives provided substantial evidence of Petitioner's control over the load vehicle, his consciousness of guilt, and his intent to participate in the criminal venture. Appendix A, at 10–12. Rejecting all of Petitioner's contentions, the court of appeals affirmed the convictions. *Id.* at 13.

REASONS FOR GRANTING THE WRIT

There is a split among the federal circuits and the state courts as to whether a pretextual stop violates the Fourth Amendment's prohibition against unreasonable searches and seizures. Even among those jurisdictions taking the majority position—that, under proper circumstances, pretextual stops are constitutional—there are differing opinions as to what constitutes a legal pretextual stop. In the instant case, the Fifth Circuit has construed the pretext doctrine as permissively as possible. In doing so, it has gone beyond the authority supporting such stops found in the language of this Court's precedent and the holdings of prior Fifth Circuit cases. Further, by holding that a hearing on such motions is no longer necessary, it has foreclosed inquiry into a large number of governmental searches

---

[2]Defendant also argued that he raised the issue of consent to the search in his motion. The Fifth Circuit found that Defendant had waived this issue by failing to raise it orally before the court. Appendix A, at 6. The Fifth Circuit expressly declined to find that Defendant's pretext argument was untimely raised, resting its holding instead on its view that under *Causey*, a hearing was unnecessary on Defendant's motion. Appendix A, at 7–8 n.2.

and seizures, instead making a categorical ruling regarding "pretext" stops that improperly sanctions a variety of unconstitutional seizures. In order to resolve the conflict among the lower courts, this Court should grant certiorari in this case and clarify when, if ever, pretextual stops by the police are authorized. SUP. CT. R. 10.1.

I. THE FIFTH CIRCUIT FAILED TO FOLLOW THE PRECEDENT OF THIS COURT, AND HAS EFFECTIVELY DETERMINED THAT PRETEXTUAL SEARCHES ARE *PER SE* REASONABLE IN HOLDING THAT HEARINGS ARE NOT NECESSARY ON MOTIONS CHARGING PRETEXT.

In *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932), the Supreme Court held that an "arrest may not be used as a pretext to search for evidence." In *Lefkowitz*, lawful arrests at the defendants' residence pursuant to valid arrest warrants were followed by a general search of the residence during which inculpatory evidence was found. Even though the arrests were clearly valid, they were held to be pretextual and not to warrant the general search of the premises.

Lefkowitz has never been overruled, questioned, or criticized by this Court. Nevertheless, a number of the Court's decisions can be read as weakening *Lefkowitz*'s authority by relying exclusively on objective factors in determining whether the constraints of the Fourth Amendment have been followed. Thus, this Court has repeatedly held that Fourth Amendment analysis ordinarily involves "an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time." *Maryland v. Macon*, 472 U.S. 463, 471 (1985) (quoting *Scott v. United States*, 436 U.S. 128, 137 (1978)). *See also United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983) (following *Scott*). In many other cases, there is support for the view that, where an officer has an objectively reasonable basis for making an investigative stop, the officer's motive or actual state of mind

is irrelevant. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court stated that the validity of a brief investigatory stop was to be "judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* at 21–22. Similarly, in *United States v. Cortez*, 449 U.S. 411 (1981), the Court announced that a *Terry* investigative stop will be upheld where "the detaining officers [had] a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id.* at 417–18.

The holding in *Scott v. United States* is even more forthright. In that case, the district court found that federal agents had intentionally failed to minimize wiretap monitoring as required by statute.[3] The Court, approving the reversal of the district court's suppression order, agreed with the government's position that "subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." *Id.* at 136. Thus, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.* at 138. Thus, the holdings in *Scott* and *Lefkowitz* appear to be in conflict: the former precludes judicial scrutiny of the motivations of the arresting or searching officer, while the latter holds that illegal motivations, if they are the real reason why a lawful action was taken, may establish a violation of the Fourth Amendment.

The Fifth Circuit has dealt with this conflict repeatedly over the last two decades. Before this Court's ruling in *Terry*, the Fifth Circuit in *Amador-Gonzales v. United States* held

---

[3] See 18 U.S.C. § 2518(5) (1976).

that an "arrest must not be a mere pretext for an otherwise illegitimate search." 391 F.2d 308, 313 (5th Cir. 1968). *Terry* did not change the court of appeals' perspective; the court explicitly rejected the inference "that the *Terry* objective 'standard' can be invoked to condone sham or pretextual searches." *United States v. Tharpe*, 536 F.2d 1098, 1101 (5th Cir. 1976) (en banc). Finally, in *United States v. Cruz*, the Fifth Circuit held that the stopping of a vehicle "as a pretext to search for illegal aliens" rendered the evidence seized in the subsequent search inadmissible. 581 F.2d 535, 539 (5th Cir. 1978) (en banc).

The Fifth Circuit overruled *Cruz* in *United States v. Causey*. In the latter case, officers had obtained an arrest warrant for Causey on a charge of failing to appear in court seven years earlier. The warrant was valid, but it was undisputed that the sole purpose for obtaining the warrant was to detain and interrogate Causey about an unrelated crime. The Fifth Circuit panel, relying on *Lefkowitz*, found the arrest to be pretextual and suppressed the fruits of the interrogation. *United States v. Causey*, 818 F.2d 354, 359 (5th Cir.), *on reh'g en banc*, 834 F.2d 1179 (5th Cir. 1987). The en banc court reversed. It held, without reference to *Lefkowitz*, that "where the officers have taken no action except what the law objectively allows their subjective motives in doing so are *not even relevant* to the suppression inquiry." 834 F.2d at 1185 (emphasis added).

Apparently relying on this language, the trial court determined that, because the Albuquerque detectives' actions were objectively legal, the fact that the reason they gave for stopping the truck was pretextual was irrelevant and no hearing was necessary. The Fifth Circuit agreed: it found that, because Petitioner had not challenged either the fact that he had a broken tail light, or the legal authority of the officers to stop cars for broken tail lights,

the officer's motivations were meaningless. Appendix A, at 7.

These interpretations of *Causey*, while arguably supported by its language, run afoul of the constraints of the Fourth Amendment. In this case, evidence presented at trial indicated that the officers followed Petitioner 60–70 miles down Interstate 25 before having him stopped. Although the detectives claimed at trial that they could have stopped Petitioner and cited him for an equipment violation,[4] they elected not to do so, initially in order to see if Petitioner would lead them to contraband, and thereafter for unexplained reasons. As no hearing was allowed, there was no evidence presented that New Mexico law allows highway stops for broken tail lights. Even if state law did allow such stops, however, the officer's actions as described above could only have the purpose of searching for evidence. Thus, even if such a stop would be legally valid in the absence of any other facts, in this case it resulted from an illegal exercise of the officer's discretion to stop the vehicle driven by Petitioner.

Prior to this case, the Fifth Circuit had interpreted *Causey* as precluding certain pretextual stops. In *United States v. Judge*, 864 F.2d 1144 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 1946 (1990), the court applied *Causey* to discretionary actions on the part of stopping officers. In *Judge*, Drug Enforcement Administration (DEA) agents conducted a search of bags in the trunk of the defendant's car. The agents argued that once a container was taken into custody, such a search was required for inventory purposes under the DEA manual. The court held, however, that the decision to take a container into custody was discretionary,

---

[4]The officers claimed that they had discretionary authority to stop persons for traffic violations; however, they admitted that traffic stops in unmarked police vehicles were discouraged, and explained that this was the reason for contacting the trooper.

and that such a discretionary action must be "viewed from an objective standpoint" in order to determine whether the officers had a "administrative or safety motivation, as opposed to an evidentiary one." 864 F.2d at 1146. As the court stated, "if an objective observer would conclude that the only legitimate purpose for opening a container found in a vehicle could have been to find evidence, the opening of the container was an illegal search." *Id.*

Thus, under *Judge*, pretextual searches were prohibited where it was apparent from the observable facts that the stop was pretextual. Such facts exist in this case, including (1) the length of time the officers followed the truck without stopping it; (2) the detectives' participation in the stop, even though another officer had already effected the stop and was pursuing the ostensibly lawful actions of checking for identification and issuing citations;[5] and (3) the fact that the detectives asked permission to search the truck and accused Petitioner of narcotics smuggling. None of these factors were discussed in the Fifth Circuit's determination that *Causey* applied, nor was *Judge* discussed in the opinion.

The Fifth Circuit's ruling improperly expands the range of police action that may be sanctioned by a technically valid arrest. In holding that a hearing is not even necessary to determine whether a pretextual stop can pass muster under the Fourth Amendment, the Fifth Circuit forgoes objective analysis of the officer's action in favor of a broad, categorical rule that any stop for violation of the traffic laws is *per se* reasonable, no matter how egregious the circumstances or how obvious that the stop was made for ulterior investigative purposes. Although this Court has not overruled *Lefkowitz*, the Fifth Circuit effectively does

[5] *See United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988) (the bounds of a proper highway stop in New Mexico are the request of a driver's license and vehicle registration, running a computer check, and issuing a citation).

so in this case. Because it is possible to harmonize the decisions of this Court without doing violence to the holding in *Lefkowitz*, certiorari should be granted and the Fifth Circuit's opinion reversed.

II. THE COURTS BELOW ARE IN DISARRAY REGARDING THE STANDARDS FOR DETERMINING THE CONSTITUTIONALITY OF PRETEXTUAL SEARCHES.

The implicit conflict between this Court's holdings in *Lefkowitz* and *Scott* is mirrored by the explicit disagreement of the lower courts with regard to the propriety of pretextual searches. Among the federal circuits there appear to be three views as to the validity of pretextual stops. The Ninth Circuit has held that "whether an arrest is a mere pretext to search turns on the motivation or primary purpose of the arresting officers." *United States v. Smith*, 802 F.2d 1119, 1124 (9th Cir. 1986). This view has been echoed, with varying degrees of consistency, by the Fourth, Eighth and District of Columbia Circuits. *See Warren v. City of Lincoln*, 816 F.2d 1254, 1257 (8th Cir. 1987) ("An arrest ostensibly for one purpose but in reality for the primary purpose of furthering an ulterior goal is unreasonable under the fourth and fourteenth amendments."), *rev'd on other grounds*, 864 F.2d 1436 (8th Cir.) (en banc), *cert. denied*, 490 U.S. 1091 (1989); *but see United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1991) (inquiry into pretext ends where officer's actions are legally authorized, without regard to motive), *petition for cert. filed*, No. 90–1029 (U.S. Apr. 11, 1991); *United States v. Whitfield*, 629 F.2d 136, 139 n.5 (D.C. Cir. 1980) (dismissing as pretextual government's claim of proper inventory search), *cert. denied*, 449 U.S. 1086 (1981); *McKnight v. United States*, 183 F.2d 977, 978 (D.C. Cir. 1950) (when "the search and not the arrest" was the real motive, "the search is not reasonable within the meaning of the Constitution")

(quoting *Henderson v. United States*, 12 F.2d 528, 531 (4th Cir. 1926) and citing *Lefkowitz*).

Other circuits have held that the test to be applied is an objective one; these "courts do not agree, however, on what objective elements are dispositive in determining whether a pretextual intrusion is unconstitutional." *United States v. Guzman*, 864 F.2d at 1515. The Sixth, Tenth and Eleventh Circuits have applied a "but for" test with regard to pretextual searches: they have held that "the proper inquiry for determining whether a stop is pretextual is 'whether a reasonable officer would have made the seizure in the absence of illegitimate motivation.' " *United States v. Hardy*, 855 F.2d 753, 756 (11th Cir. 1988) (quoting *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986)), *cert. denied*, 489 U.S. 1019 (1989); *see also United States v. Crottinger*, 928 F.2d 203, 206 (6th Cir. 1991) (following *Smith*); *Guzman*, 864 F.2d at 1517 (same).[6]

Finally, a number of circuits, again with some inconsistency, have adopted a broader, authority-based test: if the officers *could* have stopped the vehicle under state law, then the stop is valid, whether or not a reasonable officer *would* have stopped the vehicle absent the improper motive. See, *e.g.*, *United States v. McCarty*, 862 F.2d 143, 148 (7th Cir. 1988) (motives not relevant where facts give officers probable cause to arrest); *but see United States v. Lewis*, 910 F.2d 1367, 1371 (7th Cir. 1990) (otherwise valid search of automobile will violate Fourth Amendment if stop is merely a pretext for the search); *United States v. Hawkins*, 811 F.2d 210, 215 (3d Cir.) (fact that pretext given does not render search invalid),

[6]The decision in *Smith* was based on the Eleventh Circuit's reliance on *Cruz*, which, as a prior Fifth Circuit case, was controlling precedent. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). The Eleventh Circuit has continued to follow *Cruz* despite the new Fifth Circuit's rejection of its earlier decision. *Hardy*, 855 F.2d at 756 n.4.

cert. denied, 484 U.S. 833 (1987); *United States v. Nersesian*, 824 F.2d 1294, 1316 (2d Cir.), *cert. denied*, 484 U.S. 958 (1987) (pivotal factor is whether there exists at the outset a valid basis for the search); *Cummins*, 920 F.2d at 501.

The state courts, though generally favoring objective standards for determining the constitutionality of a search,[7] are in similar disarray on the issue of the objective standard to be applied. Some follow the reasoning of *Causey*, holding that "when police officers do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and not subject to inquiry, and the results of their investigations are not to be suppressed." *People v. Anderson*, 189 Ill. App. 3d 289, 523 N.E.2d 1034, 1040 (Ill. App. Ct. 1988), *cert. denied*, 109 S.Ct. 1935 (1989). *See also Gordon v. State*, 801 S.W.2d 899, 910 (Tex. Crim. App. 1990) (en banc) (following *Causey*); *State v. Jeney*, 163 Ariz. 293, 787 P.2d 1089, 1092 (Ariz. Ct. App. 1989) ("so long as the police do no more than they are objectively authorized and legally permitted to do, their motives in making an arrest are irrelevant and not subject to inquiry"); *State v. Law*, 115 Idaho 769, 769 P.2d 1141 (Idaho App. 1989) (same). Others follow the view of the Eleventh Circuit in *Smith* and the Tenth Circuit in *Guzman*, ruling that "[w]here the police have a dual motive in making an arrest, what might be termed the covert motive is not tainted by the overt motive, even though the covert motive may be dominant, so long as the arrest would have been carried out had the covert motive been absent." *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65, 68 (Ark. 1986); *See*

[7]*But see State v. Vann*, 230 Neb. 601, 432 N.W.2d 810, 813 (Neb. 1988) ("An arrest ostensibly for one purpose but in reality for the primary purpose of furthering an ulterior goal is unreasonable under the fourth and fourteenth amendments [to the U.S. Constitution].") (quoting *Warren*, 816 F.2d at 1257).

also Brown v. State, 738 P.2d. 1092, 1095 (Wyo. 1987) (same); *State v. Blair*, 691 S.W.2d 259 (Mo. 1985) (en banc) (same), *cert. dismissed*, 480 U.S. 689 (1987).

It is this latter, "but for" analysis that states the better rule. First, this view harmonizes the prior cases of this Court, as it follows both the prohibition against pretext searches in *Lefkowitz* and the admonition that the courts look to objective standards in *Terry* and its progeny. *See Smith v. Allwright*, 321 U.S. 649, 665 (1944) (continuity in the Court's constitutional decisions is desirable); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (departure from *stare decisis* demands specific justification). Second, the "but for" test for pretextual searches better protects the rights of the ordinary citizen. As the Tenth Circuit explained in *Guzman*, the alternative test proposed by *Causey* is too expansive:

> [A]n objective test that asks no more than whether some set of facts might justify a given stop would permit arbitrary intrusions in situations such as traffic stops. Under such a test, thousands of everyday citizens who violate minor traffic regulations would be subject to unfettered police discretion as to whom to stop. To paraphrase one commentator, in the absence of standardized police procedures that limit discretion, whether we are simply allowed to continue on our way with a stern look, or instead are stopped and subjected to lengthy and intrusive interrogation when we forget to wear our seat belts, turns on no more than "the state of the digestion of any officer who stops us or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin."

864 F.2d at 1516 (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 416 (1974)). On the other hand, unlike the "subjective" or "primary purpose" test, an objective "but for" test can be easily administered on a case-by-case basis without improper and wasteful second-guessing of the officers' motivations by the courts.

Petitioner submits that, under an objective "but for" standard, the officers' stop of his truck was clearly pretextual. The officers followed Petitioner for approximately 30 miles,

initially hoping that he would lead them to a reputed "stash" cite. When this did not occur, they continued to follow him for an additional 30 miles without explaining their purpose. When they still did not see any illegal activity, they contacted a state trooper, who stopped the truck for a broken tail light. They knew that they were outside of their own jurisdiction at the time, and that they were discouraged to make such stops themselves when travelling in an unmarked vehicle. It is clear that, but for the desire to search the truck and question Petitioner, the stop would never have been effected; indeed, after the trooper made the stop, the officers accused Petitioner of drug trafficking and asked permission to search the truck. Under these circumstances, the stop of Petitioner was pretextual, or at least sufficiently suspect to require a hearing to determine its propriety. By foreclosing such hearings in reliance on *Causey*, the Fifth Circuit has impermissibly construed the requirements of the Fourth Amendment.

III. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT.

This case involves the scope of an exception to the warrant requirement of the Fourth Amendment. The scope of such exceptions have been "specifically established and well-delineated" by this Court, *Horton v. California*, 110 S.Ct. 2301, 2306 (1990), and a "warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (quoting *Terry*, 391 U.S. at 25–26). In this case, the Fifth Circuit has effectively barred inquiry into those circumstances; as this case shows, under the *Causey* rule, the everyday practice of the district courts is to ignore claims of pretext, no matter how minor the ostensible reason for a stop, how improper the officer's actual motivation, or how unlikely that the stop would have been made without the

existence of an impermissible intent. By failing to even require hearings on pretext claims, the court of appeals has abridged the right of the citizenry to judicial review of the legality of discretionary, and sometimes arbitrary, police actions. Thus, this decision could have serious, detrimental consequences for the administration of constitutional jurisprudence on searches and seizures.

Moreover, the multiple standards applied by lower courts in the "pretext stop" context make it difficult for the officer in the field to conform his actions to constitutional standards, and equally difficult for the ordinary citizen to understand the governmental intrusion to which he may or may not be constitutionally subjected. This confusion should be rectified by a comprehensive statement from this Court. As Senior District Judge Hubert L. Will stated in *United States v. Kordosky*, 878 F.2d 991 (7th Cir. 1989), *vacated on other grounds*, 110 S.Ct. 1943 (1990):

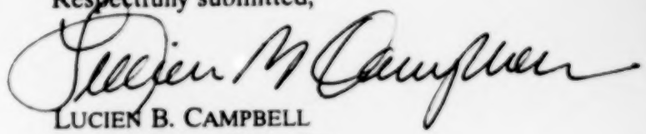
> The result of the "objective" test is clearly inconsistent with the abjuration in *Lefkowitz* that an arrest may not be used as a "pretext to search for evidence." It seems to me that, given the diametrically opposed interpretations of the fourth amendment reflected in the decisions of the various circuits and the frequency with which the issue arises, clarification is badly needed.

Id. at 995 (Will, J., concurring).

CONCLUSION

For the forgoing reasons, Petitioner prays this Honorable Court will issue a writ of certiorari and review the opinion below.

Respectfully submitted,



LUCIEN B. CAMPBELL
Federal Public Defender
Western District of Texas
727 E. Durango Blvd., B–207
San Antonio, Texas 78206
(512) 229–6700

Attorney of Record for Petitioner

HENRY J. BEMPORAD
Assistant Federal Public Defender

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-8462
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MARIO ENRIQUEZ-NEVAREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP 90 CR 53 2(H))

(April 10 , 1991)

Before POLITZ, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Mario Enriquez-Nevarez was convicted on charges of conspiracy to import marihuana; importing, and aiding and abetting in the importation of, marihuana; and possessing, and aiding and abetting in the possession of, marihuana, with intent to distribute. On appeal, he challenges the sufficiency of the evidence and the district court's refusal to conduct a hearing on his motion to suppress. We AFFIRM.

---

[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

On January 30, 1990, two Albuquerque, New Mexico, detectives were conducting surveillance at the residence of Richard Montoya, a known narcotics trafficker. Enriquez went to the residence. The detectives followed him from Montoya's residence to his house, where he stayed for 30-45 minutes. He left his residence, driving a blue van; and the detectives followed him to a motel. Enriquez knocked on a door to one of the motel rooms, but got no response. From the motel, the detectives followed Enriquez to a bar called the Drift-In Lounge. Enriquez and his co-defendant, Rigoberto Castillo-Olivas, left the lounge in the blue van. The detectives followed the van for about half a mile, and then lost sight of it for five to ten minutes. They then observed the van in the same general location where they had lost sight of it; it was driven by Enriquez, and followed by a blue and white pick-up truck with Idaho license plates being driven by Castillo. The detectives followed the van and truck to Enriquez's residence. Enriquez came out of his house carrying a New Mexico license plate. Both men got into the blue and white truck, and Enriquez drove. They went to a video store, back to the residence, and then to a gas station. After they left the gas station, they headed south on Interstate 25. The detectives followed them, thinking that they would go to a "stash" location about thirty miles south of Albuquerque; however, they passed the location and kept heading south.

After following Enriquez and Castillo for about sixty or seventy miles, the detectives had a New Mexico state trooper stop the truck for a broken tail light. The trooper issued a citation to Enriquez for having no driver's license. The detectives then got permission from Enriquez to search the truck. Under the seat, they found a New Mexico license plate, but no narcotics. When the detectives asked if there were any narcotics in the truck, Enriquez replied that people don't take narcotics south; rather, they bring them back from Mexico. Enriquez said that he was going to Juarez to get the bumper on his truck fixed and to buy some soft drinks. The truck did not have a bumper; and, there were several cases of empty soft drink bottles in the back of the truck. However, Albuquerque is approximately 320 miles from Juarez -- the drive takes about four to four and one-half hours.

The next morning, Enriquez drove the blue and white truck to the border crossing from Juarez into El Paso. When questioned at the primary inspection station, Enriquez would not make eye contact with the Customs agent; and his voice started breaking. He told the Customs agent that he had been to Juarez to visit some relatives and to purchase some soft drinks. There were three cases of soft drinks in the back of the truck, but Enriquez carried no luggage. He was sent to the secondary inspection area.

Immediately behind Enriquez in the same lane of the bridge was a white pick-up truck driven by Castillo. In the

gas tank of the white truck, Customs agents discovered fifty-four and one-half pounds of marihuana. The license plate on the white truck was the same license plate that had been found the previous day in the blue and white truck during the stop on Interstate 25 in New Mexico. Also, among Castillo's personal effects was the traffic citation issued to Enriquez that day.

Enriquez and Castillo were indicted for (1) conspiracy to import marihuana, in violation of 21 U.S.C. §§ 952(a), 960(a)(1), and 963; (2) importing and aiding and abetting the importation of marihuana, in violation of 21 U.S.C. §§ 952(a) and 960(a)(1), and 18 U.S.C. § 2; and (3) possessing and aiding and abetting the possession of marihuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and 18 U.S.C. § 2. The district court denied motions for acquittal both at the close of the government's case-in-chief and at the close of all of the evidence. The jury found both defendants guilty on all three counts. Enriquez timely appealed.

II.

Enriquez contends that the district court erred in failing to conduct a hearing on his motion to suppress evidence obtained from the stop by New Mexico law enforcement officers and that there was insufficient evidence to prove that he knowingly and intentionally participated in a criminal venture. Neither contention has merit.

A.

On June 21, 1990, the day his trial began, Enriquez filed a motion to suppress evidence that was obtained in connection with the above-described January 30 stop by New Mexico law enforcement officers. The district court denied the motion, without a hearing, on the grounds that (1) Enriquez had waited too late to file the motion; and (2) because the officers had an objectively legal reason to stop the truck and issued a citation to Enriquez, their motive for the stop was irrelevant.

An evidentiary hearing on a motion to suppress is required "only when the defendant alleges sufficient facts which, if proven, would justify relief." *United States v. Harrelson*, 705 F.2d 733, 737 (5th Cir. 1983). "Factual allegations set forth in the defendant's motion, including any accompanying affidavits, must be 'sufficiently definite, specific, detailed, and nonconjectural, to enable the court to conclude that a substantial claim is presented.'" *Id.* (quotations omitted). "General or conclusionary assertions, founded upon mere suspicion or conjecture, will not suffice." *Id.* In deciding whether a hearing is necessary, the district court is "left with a certain amount of discretion"; and the determination "is necessarily dependent upon the particular facts which attend a particular request." *Id.* (quotation omitted).

Enriquez contends that the district court erred, because his motion raised the factual issue of whether

Enriquez consented to the search. In his written motion, Enriquez sought suppression of the evidence on the grounds that (1) the stop was pretextual; and (2) he did not knowingly consent to the search. The entire discussion of the consent issue in the motion consisted of the following conclusory statements:

> In addition to the illegal stop, Defendant did not knowingly consent to the search. As such, the detectives had no legal basis to search. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Obviously, such general assertions were wholly insufficient to enable the district court to conclude that a substantial claim was presented.

In any event, the record demonstrates that the district court did not see the written motion prior to its ruling. Immediately prior to opening statements, when Enriquez's counsel brought the motion to the attention of the court, the district judge indicated that he had not seen any written motion. In his oral argument to the district court, Enriquez's counsel contended that the stop was pretextual, but did not argue or raise the consent issue. A defendant's failure to assert a particular ground in support of a motion to suppress "operates as a waiver unless the district court grants relief for good cause shown." *Harrelson*, 705 F.2d at 738. Because Enriquez did not bring the consent issue to the attention of the district court, we hold that the issue was waived. In neither the district court, nor this court, has Enriquez made any attempt to demonstrate "good cause"

for the failure to present the issue to the district court prior to its ruling.

Enriquez also argues that a hearing was necessary because the stop was pretextual. In *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc), this court held that, so long as the police conduct is objectively authorized and legally permitted, the motives of the officers are irrelevant and not subject to inquiry. Enriquez argues that *Causey* does not foreclose his argument, because the district court made an improper assumption that the stop was objectively legal. However, in both his written motion and argument, Enriquez did not challenge either the factual basis for the stop, a broken tail light, or the legal authority in New Mexico for a stop on that basis. Enriquez's conclusory allegations in support of the motion to suppress were insufficient to create an issue of fact with respect to either the factual basis for, or the legality of, the stop. Therefore, we hold that the district court correctly applied *Causey* and did not abuse its discretion in failing to conduct a hearing on the motion.[2]

---

[2] The district court also denied the motion to suppress on the ground that it was untimely. Enriquez's counsel argued that the motion had not been made earlier because key evidence regarding the nature of the stop (the notes of the Albuquerque detectives) was not furnished to him until the afternoon before trial. It is clear, however, that Enriquez was aware of the stop well in advance of the trial. On April 10, 1990, more than two months prior to trial, in its response to Enriquez's motion to sever, the government stated that it proposed "to present testimony about the events in New Mexico on Interstate Highway 25 through a member of the New Mexico State Police." The district court concluded that defense counsel could have investigated the

B.

Enriquez also asserts that the evidence was insufficient to prove beyond a reasonable doubt that (1) he knew of the presence of the marijuana hidden in the truck driven by Castillo; and (2) he intentionally participated in a criminal venture. Of course, in reviewing an insufficient evidence claim, we view the evidence and all reasonable inferences in the light most favorable to the jury's verdict to determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. ***Glasser v. United States***, 315 U.S. 60, 80 (1942); ***United States v. Lechuga***, 888 F.2d 1472, 1476 (5th Cir. 1989).

With respect to the conspiracy charge, the government was required to prove beyond a reasonable doubt (1) the existence of an agreement to violate the narcotics laws; (2) knowledge of the conspiracy; and (3) voluntary participation in it. *E.g.*, ***United States v. Rodriquez-Mireles***, 896 F.2d 890, 892 (5th Cir. 1990). An aiding and abetting conviction requires proof beyond a reasonable doubt that the defendant "associated with a criminal venture, participated in the venture, and sought by his action to make the venture succeed." ***United States v. Casto***, 889 F.2d 562, 565 (5th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1164 (1990) (quoting ***United States v. Manotas-Mejia***, 824 F.2d 360, 367 (5th Cir.), *cert. denied*, 484 U.S. 957 (1987)).

circumstances of the stop and filed the motion to suppress in a more timely manner. Based upon our holding, we do not reach this issue.

With respect to the substantive possession charge, the government was required to prove (1) knowing, (2) possession of marihuana, (3) with intent to distribute. ***United States v. Molinar-Apodaca***, 889 F.2d 1417, 1423 (5th Cir. 1989). The importation charge required proof of elements similar to those involved in the possession charge, with the addition of proof "that the defendant played a role in bringing the marijuana from a foreign country into the United States." ***United States v. Williams-Hendricks***, 805 F.2d 496, 500 (5th Cir. 1986).

1.

"Knowledge of the presence of a controlled substance often may be inferred from the exercise of control over a vehicle in which the illegal substance is concealed." ***United States v. Diaz-Carreon***, 915 F.2d 951, 954 (5th Cir. 1990). However, "[p]ossession of or control over a vehicle containing drugs in a hidden compartment does not itself prove guilty knowledge." ***United States v. McDonald***, 905 F.2d 871, 874 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 566 (1990). In such cases, "additional evidence indicating knowledge--circumstances evidencing a *consciousness* of guilt" is necessary. ***Diaz-Carreon***, 915 F.2d at 954 (emphasis in original).

Enriquez argues that an inference of his knowledge of the presence of the marihuana is unwarranted because he did not own or exercise control over the vehicle containing

marihuana, and there is no circumstantial evidence of a consciousness of guilt on his part. We disagree.

On the day before the arrest, Castillo rode with Enriquez from Albuquerque to Juarez in the blue and white pick-up truck. When Enriquez attempted to cross the border the next day, Castillo, driving the white truck in which the marihuana was concealed, was immediately behind him in the same lane of the bridge. The license plate that Enriquez obtained from his residence, and which was discovered in the search of his vehicle on the previous day, was on the white truck. From this circumstantial evidence, the jury could reasonably infer that Enriquez exercised a significant degree of control over the white truck.

There was also substantial circumstantial evidence of a consciousness of guilt on the part of Enriquez. The citation issued to Enriquez for driving without a driver's license on the day before the arrest and seizure was found among Castillo's personal effects when he was arrested. Although Enriquez's association with Castillo and his presence with Castillo and the marihuana at the border crossing is insufficient, standing alone, to show guilty knowledge, it is a factor to be considered. *See United States v. Natel*, 812 F.2d 937, 941 (5th Cir. 1987).

Also, the Customs agent who spoke with Enriquez at the primary inspection station testified that Enriquez would not make eye contact with him and that his voice started breaking during questioning. "Nervous behavior at an

inspection station frequently constitutes persuasive evidence of guilty knowledge." *Diaz-Carreon*, 915 F.2d at 954.

Enriquez's statements to the law enforcement officers also support an inference of guilty knowledge. When the Albuquerque detectives stopped Enriquez the day before the arrest and asked him if there were any narcotics in the truck, he responded that people do not take narcotics south, but instead bring them back from Mexico. At that time, Enriquez told the detectives that he was going to Juarez to get his bumper repaired and to buy some soft drinks--approximately 300 miles away. And, at the inspection station the next day, Enriquez stated that he had gone to Juarez to visit some relatives and to buy some soft drinks. He did not mention his intention to visit relatives to the Albuquerque detectives, nor did he mention the bumper to the Customs agents at the border. Inconsistent statements are "[p]erhaps the strongest evidence of a criminal defendant's guilty knowledge." *Diaz-Carreon*, 915 F.2d at 954-55. Although Enriquez was consistent in his statements regarding the purchase of soft drinks, the implausibility of driving 320 miles from Albuquerque to Juarez to purchase three cases of soft drinks supports a reasonable inference of guilty knowledge.[3]

---

[3] During the government's case in chief, one of the Customs agents testified, without objection, that, prior to his referral to secondary inspection, Castillo stated that he had come down to Juarez with "a friend" and that he was taking the white truck back to Albuquerque for that friend.

Although these circumstances, considered separately, might be insufficient to prove guilty knowledge beyond a reasonable doubt, the totality of the circumstances supports an inference that Enriquez knew of the presence of the marihuana hidden in the truck driven by Castillo. *See* ***United States v. Villasenor***, 894 F.2d 1422, 1425-26 (5th Cir. 1990) (quoting ***United States v. Henry***, 849 F.2d 1534, 1537 (5th Cir. 1988)) ("'Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.'").

Enriquez contends that, even if he knew of the presence of the marihuana, there was insufficient evidence to prove either his participation in the conspiracy or that he aided and abetted Castillo in committing the substantive offenses. The same circumstantial evidence that supports a reasonable inference of Enriquez's guilty knowledge also supports an inference that he voluntarily and intentionally participated in the criminal venture.

Enriquez argues that Castillo's statement cannot be considered in evaluating the sufficiency of the evidence, because the district court later instructed the jury that Castillo's statements could be considered only against him, and not against Enriquez. Because we conclude that the evidence is sufficient to sustain Enriquez's convictions, even without considering Castillo's statement, we do not reach whether that statement may properly be considered in evaluating the sufficiency of the evidence.

III.

For the foregoing reasons, the judgment of conviction is

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	NO. EP-90-CR-53H
VS.	Trial Proceedings
RIGOBERTO CASTILLO-OLIVAS MARIO ENRIQUEZ-NEVAREZ	June 21, 1990

Volume 1

A p p e a r a n c e s:

For the Government:	Francisco Macias Assistant U. S. Attorney United States Courthouse El Paso, Texas 79901
For Rigoberto Castillo-Olivas	Ricardo D. Gonzalez Attorney at Law 4621 Pershing Drive El Paso, Texas
For Mario Enriquez-Nevarez	Robert Perez Assistant Federal Public Defender Federal Building El Paso, Texas 79901
Court Reporter:	Chris Carpenter 439 U.S. Courthouse El Paso, Texas

The above styled and numbered cause came on for trial before the Honorable Harry Lee Hudspeth, Judge presiding, with a jury, on June 21, 1990, commencing at 9:00 in the morning, in courtroom number 1, United States Courthouse, El Paso, Texas.

MR. MACIAS: Your Honor, Francisco Macias, representing the United States, we're ready to proceed.

MR. PEREZ: Robert Perez for Mario Enriquez-Nevarez, we're ready pending the hearing of our motions.

THE COURT: I don't know anything about any motions. What motions do you mean?

MR. PEREZ: We have motions in limine, Your Honor. And yesterday the Government delivered to us some discovery we had not yet seen which dealt with the stop of my client's truck as he was heading south on I25, and it became very apparent from the discovery that we had for the first time that the stop was pretextual, so we filed a motion to suppress and/or a motion in limine concerning that stop, Your Honor.

THE COURT: Well, why do you think pretext matters these days? Fifth Circuit changed the law on that.

MR. PEREZ: I didn't run into any Fifth Circuit law, Your Honor. I ran into Eleventh Circuit and Seventh --

THE COURT: What's the name of the case, "Causey"? Is that the En Banc case that says no more pretext stop law?

MR. MACIAS: I believe so. But it wasn't a pretext stop. There was a ticket issued.

THE COURT: That's what I mean. If their real secret motive was just to investigate or something, as long as there was an actual event, a violation, and they issued a

ticket for it, then that is the end of the story.

MR. PEREZ: It would be one thing, Your Honor, except that the detectives who did the search were out of their jurisdiction at the time, and they had no reason to stop my client so they had a highway patrolman pull him over and then they pulled in behind and did the search.

MR. GONZALES: If I might comment, Your Honor, there is virtual admission in the notes of the officers. The only thing that would make it more specific would be for them to have said that this is a pretext --

THE COURT: Well, you have waited too late to bring all of this stuff up. As far as I am concerned, we're ready for the jury.

What else do you have? You said something about motions.

MR. PEREZ: May I say something for the record? We were unaware of the circumstances until yesterday afternoon.

THE COURT: I have heard all of this before. I don't know why you were unaware of it, but I have heard all of it before -- at some hearing we had in this court, as a matter of fact.

MR. PEREZ: Your Honor, what we heard was that they were stopped, but we didn't know where or how it happened and --

THE COURT: You didn't investigate?

MR. PEREZ: We had no way to investigate that, Your Honor. It was in the hands of the Government.

THE COURT: What do you mean you didn't have any way to investigate it? Get serious. You are a clever criminal defense lawyer. You have all kinds of ways to investigate. Don't you have investigators on your staff?

MR. PEREZ: Yes, we do, Your Honor.

THE COURT: All right. That is ridiculous.

What other motions do you have? I am getting ready to bring the jury in.

MR. PEREZ: Your Honor, we have a motion in limine "A" which is basically regular motion dealing with crimes, wrongs or acts. Motion limine "B" is going to deal with the agents' state of mind at the time they were conducting surveillance of my client. I believe the reason for them conducting surveillance are irrelevant to this case and whatever reason --

THE COURT: You're right about this. That can't be quarreled with.

MR. PEREZ: And whatever reasons are irrelevant to this case.

THE COURT: What else?

MR. PEREZ: Motion in limine "C" -- Motion in limine "D," Your Honor, I filed a motion to keep the statements of the co-defendant from being elicited by the

APPENDIX "C"

5-22

UNITED STATES COURT OF APPEALS

FILED

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED

APR 10 1991

GILBERT F. GANUCHEAU
CLERK

No. 90-8462
Summary Calendar

D.C. Docket No. EP 90 CR 53 2(H)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

51141-080

MARIO ENRIQUEZ-NAVEREZ,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before POLITZ, DAVIS, and BARKSDALE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

April 10, 1991

91 9 12:06

U.S. MARSHAL

AAS (OFFICE)

ISSUED AS MANDATE: MAY 02 1991

A true copy of the original, I certify
Clerk, U.S. Fifth Circuit
Deputy

A true copy
Test GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit
By Marilyn A. Taylor
Deputy
New Orleans, Louisiana
MAY 02 1991

35

APPENDIX "D"

Filed 6-21-90

Clerk, U. S. District Court
Western District of Texas

By [illegible] Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

UNITED STATES OF AMERICA	)	
	)	
VS.	)	NO. EP-90-CR-53-(2)-H
	)	
MARIO ENRIQUEZ-NEVAREZ	)	

MOTION TO SUPPRESS OR
MOTION IN LIMINE C

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Defendant, Mario Enriquez-Nevarez, by and through his undersigned attorney, and files this Motion to Suppress or Motion in Limine C to suppress or exclude any evidence obtained by New Mexico State police as a result of the stop and search of Defendant's vehicle on Interstate Highway 25.

I

Discovery was provided to the Defendant on June 20, 1990, the day before trial and after jury selection, regarding a stop and search of Defendant's vehicle which occurred on January 30, 1990, on Interstate Highway 25. The discovery provided indicates that Defendant was under the surveillance by New Mexico State detectives. The detectives who were following the Defendant on Interstate 25 had no reasonable suspicion or probable cause to stop the Defendant's vehicle. The discovery indicates that the detectives flagged down a State Highway patrolman to stop the Defendant so that the Defendant's vehicle could be searched. It is clear from the discovery that the reasons for this stop were pretextual. Thus, any evidence obtained from this pretextual stop and search should be suppressed as the evidence was obtained in contravention of the Fourth Amendment of the United States Constitution.

In addition, the statements obtained and observations made by the detectives have no relevance to this case, and the out-of-court statements made constitute hearsay.

Wherefore, premises considered, Defendant requests that the Court exclude such evidence on the grounds that the evidence obtained has no relevance to this case, and the evidence was obtained in violation of the Fourth Amendment of the United States Constitution.

Respectfully submitted,

LUCIEN B. CAMPBELL
Federal Public Defender

Robert J. Perez

ROBERT J. PEREZ, Assistant
Federal Public Defender
Western District of Texas
Federal Building
700 E. San Antonio St., D-401
El Paso, Texas 79901

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was furnished to Francisco Macias, Assistant United States Attorney, Room 353, United States Courthouse, 511 E. San Antonio Street, El Paso, Texas 79901, and to Ricardo D. Gonzalez, Attorney for Codefendant, 4621 Pershing, El Paso, Texas 79903, on this 21st day of June, 1990.

Robert J. Perez

ROBERT J. PEREZ

14

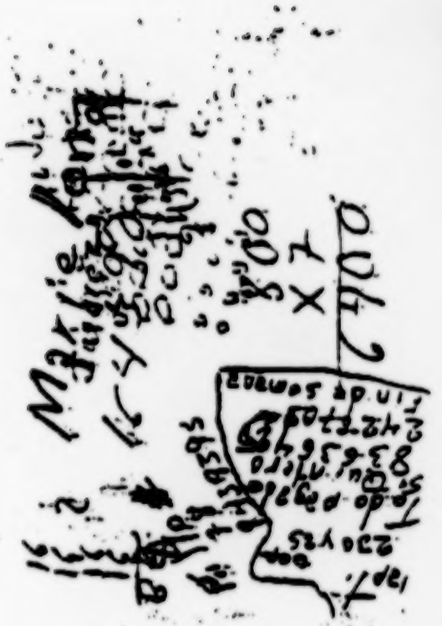
DET STATEMENT/NOTES + PAPERS RECEIVED FROM TINSH

① Detectives observed the vehicle traveling southbound on Interstate 25.
② A state police officer was flagged down for assistance. Vehicle was stopped for having a broken tail light
③. Both subjects were asked to exit the truck. Detective Torres explained why they were stop Detective showed them the defective light
④. Both subjects asked why detectives were at that location... Enriquez was advised that w had information that he had a load of narc and that he sold alot of cocaine is Alb.
⑤ Enriquez advised that people don't take drug to Mexico, but that they [redacted] from the
⑥ Subjects claimed they were going to Juare for bottled cokes and a bumper for his newly painted truck
⑦ Enriquez was asked for permission to search his truck. He agreed to allow detectives to search. Was positive
⑧ During the search of the truck detectives observed a New Mexico truck plate under the seat
⑨ Both subject agreed to a search of their body. Castilla appeared to be nervous while detective spoke to them.

1415 Hrs
Blue Van at
Richard Montoyas
on Bethel
Possible Exchange
Lots of People (N.M.A.)
1445 Hrs
Blue Van
Goes To Eaglewood

1513 Hrs Blue Van
Goes To Ranchland
Motel Parks
S.E. Corner

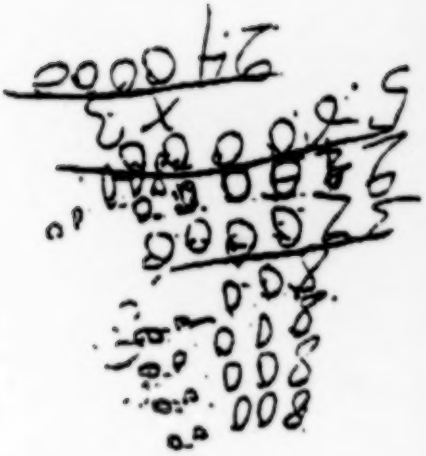
Lost in traffic (Rio Grande)
Blue Truck (Rio Grande)
following Van
1613 Hrs
Blue Van +
Truck Arrive at
Eaglewood.
1632 Hrs
Truck Holding
N.M. Plate Gets
into Truck w/other
Man in Cowboy Hat
1637 Hrs



1517 Hrs
Blue Van State
Police Vehicle
Stopped for No
Tail Light Vehicle
Occupants Were Identified
Identification [illegible]
[illegible]

1415 Hrs
BLUE VAN AT
RICHARD MONTOYAS
ON BETHEL
POSSIBLE EXCHANGE
LOTS OF PEOPLE (N.M.A.)
1445 Hrs
BLUE VAN
GOES TO ENGLEWOOD

1513 Hrs BLUE VAN
GOES TO REGIENCY
MOTEL BACK
S.E. CORNER



(9)

KNOCKS - NO ANSWER
POSSIBLY = 7

1522
BLUE VAN
AT D.I. LOUNGE
PICKS UP S.M.A.
W/COWBOY HAT

BLUE VAN LOSES
LOST IN TRAFFIC

1550 Hrs
VAN FOUND AT

[redacted]

1811 Hrs
ENGLEWOOD STATE
POLICE VEHICLE
STOPPED FOR NO
TAIL LIGHT VEHICLE
SEARCHED NEG RESULTS
IDAHO PLATE [redacted] 15347
N.M. PLATE IN
VEHICLE NM 444-600

ORIGINAL

No. 91-5087

RECEIVED
AUG 21 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
AUG 20 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MARIO ENRIQUEZ-NEVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court correctly declined to hold a hearing in response to petitioner's claim that the stop of his truck was pretextual.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-5087

MARIO ENRIQUEZ-NEVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is not reported, but the judgment is noted at 931 F.2d 890 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1991. The petition for a writ of certiorari was filed on July 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of

importing marijuana, in violation of 21 U.S.C. 952(a); conspiring to commit that offense, in violation of 21 U.S.C. 963; and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 27 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. A1-A13.

1. On January 30, 1990, petitioner arrived at the residence of Richard Montoya, a known narcotics trafficker in Albuquerque, New Mexico. Two Albuquerque detectives, who were maintaining surveillance, saw petitioner engage in what they believed was a narcotics transaction with an occupant of Montoya's residence. Pet. App. A2; Gov't C.A. Br. 3. Accordingly, the detectives followed petitioner when he left. Petitioner, driving a blue van, went to a bar where he picked up co-defendant Rigoberto Castillo. The detectives followed the van for about half a mile before briefly losing sight of it. When they spotted the van again, petitioner was driving and Castillo was following in a pickup truck with Idaho license plates. Both the van and the truck drove to petitioner's house, where petitioner retrieved a New Mexico license plate. Petitioner and Castillo then left in the pickup truck and eventually headed onto a highway going south from Albuquerque. The detectives thought they were going to a "stash" house some 30 miles away, but the two men passed the location and continued driving south. Pet. App. A2.

After the detectives had followed petitioner for 60 to 70 miles, they asked a New Mexico state trooper to stop the pickup

truck because it had a broken tail light. The trooper did so. When petitioner was unable to produce a driver's license, the trooper issued a citation for that infraction. The detectives then joined the trooper and obtained petitioner's permission to search the truck; the search turned up the New Mexico license plate but no narcotics. When the detectives asked petitioner if there were any narcotics in the truck, petitioner responded that people do not transport narcotics south but rather bring them back north from Mexico. Petitioner explained that the purpose of his trip was to go to Juarez, Mexico, to have the bumper on his truck fixed and to buy some soft drinks.[1] Pet. App. A3.

The next day petitioner drove the truck to the border crossing from Juarez into El Paso, Texas. At the primary inspection station, petitioner refused to make eye contact with the Customs agent, and his voice broke when he told the agent that he had been to Juarez to visit relatives and to buy soft drinks. The agent directed petitioner to the secondary inspection station. Pet. App. A3. Castillo was immediately behind petitioner, driving a white pickup truck that bore the license plate discovered in the stop the previous day. When the Customs agent questioned Castillo about his citizenship, Castillo's hand shook with nervousness as he handed his identification to the inspector. In addition, his voice broke and he stuttered in response to questions. In looking under the hood of the white truck, the agent noticed that the gas tank had been tampered with. A search

---

[1] Albuquerque is 320 miles from Juarez. Pet. App. A3.

of that tank yielded 54 1/2 pounds of marijuana. Gov't C.A. Br. 6-7; Pet. App. A3-A4.

2. After jury selection, petitioner moved to suppress the fruits of the stop of his truck by the New Mexico officers, arguing that the stop was pretextual. The district court denied the motion without a hearing, finding both that it was untimely and that the pretext claim was barred by the Fifth Circuit's decision in United States v. Causey, 834 F.2d 1179 (1987) (en banc). Pet. App. A5, A7 & n.2; 6/21/90 Tr. 28-30.

3. On appeal, petitioner argued that the district court had erred in failing to conduct a hearing on whether the stop of his truck was pretextual. The court of appeals rejected that claim, noting that in Causey, the court had held that "so long as police conduct is objectively authorized and legally permitted, the motives of the officers are irrelevant and not subject to inquiry." Pet. App. A7. Petitioner claimed that the district court had erroneously assumed that the stop in this case was "objectively legal." Ibid. The court of appeals, however, observed that petitioner had never challenged the fact that the truck had a broken tail light or that New Mexico police could make a traffic stop for that violation. In light of petitioner's failure to establish a genuine issue regarding the legality of the stop, the court held that the failure to hold a hearing on petitioner's claim was not erroneous.[2] Ibid.

---

[2] The court did not reach the issue whether petitioner's suppression motion was untimely. Pet. App. A7 n.2. It noted, however, that despite petitioner's claim that his eleventh-hour motion was warranted by the government's production of the notes of the Albuquerque detectives on the afternoon before trial, petitioner clearly knew of the stop well before the trial, and the government had indicated two months previously that it intended to present evidence about the stop. Ibid. The court also noted that the district court had found that petitioner could have filed a timely motion if he had conducted an investigation. Ibid.

ARGUMENT

Petitioner contends (Pet. 7-18) that the stop of his truck for a traffic violation in New Mexico was a pretext to search the vehicle, and that the license plate found in the truck and his statements made during the stop should have been suppressed. The court of appeals correctly rejected petitioner's contention, and the issue presented in this case does not raise a conflict calling for this Court's review.

1. Petitioner contends that an arrest that is objectively supported by probable cause may be invalidated as pretextual. That contention is inconsistent with the settled rule that the validity of searches and seizures under the Fourth Amendment must be determined under "a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." Scott v. United States, 436 U.S. 128 (1978). In Scott, the Court upheld the admissibility of wiretap evidence under 18 U.S.C. 2515 notwithstanding the officers' purposeful failure to comply with a minimization requirement. Relying on its decisions interpreting the Fourth Amendment, the Court explained that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate

the action taken as long as the circumstances, viewed objectively, justify that action." 436 U.S. at 138.

Subsequent cases reflect the same principle. In United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983), the Coast Guard stopped a vessel to check its documentation pursuant to a statute authorizing such inspections. Relying on Scott, the Court rejected the argument that the inspection was invalid because the Coast Guard's real reason for conducting the inspection was to pursue "an informant's tip that [the] vessel * * * was thought to be carrying marijuana." In Maryland v. Macon, 472 U.S. 463, 470-471 (1985), undercover officers paid for obscene materials with marked money that they intended to retrieve for use as evidence. The Court rejected the claim that the transaction, which constituted a purchase when viewed objectively, was actually a warrantless seizure because of the officers' intent. And in Horton v. California, 110 S. Ct. 2301 (1990), the Court rejected the "inadvertence" rule, under which police officers could not seize evidence found in plain view during a warrant-authorized search, where the officers had suspected that they might find the evidence but had failed to seek a warrant to search for it. The Court stated that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." Id. at 2308-2309. These cases, as petitioner concedes (Pet. 9), "preclude[] judicial scrutiny of the motives of the arresting or

searching officer" and support the refusal of the court of appeals in this case to sanction an inquiry into the allegedly ulterior motives of New Mexico law enforcement officials.

Contrary to petitioner's contention (Pet 8-9), United States v. Lefkowitz, 285 U.S. 452 (1932), is not inconsistent with the line of cases discussed above. Petitioner relies on the statement in Lefkowitz that "[a]n arrest may not be used as a pretext to search for evidence." Id. at 467. Taken in context, however, that statement does not authorize courts to invalidate arrests on pretext grounds. The "only question presented" in Lefkowitz was whether it was reasonable for police to conduct a general search of the rooms of a house incident to an arrest made in the house. Id. at 463. The Court's analysis considered only that issue, see id. at 463-467, and did not address the separate question whether the arrest itself could be challenged despite the existence of objective facts to justify it. Fairly read, the statement in Lefkowitz that an arrest cannot be used as a "pretext" for a search means only that an arrest warrant cannot justify a relatively unlimited search of the premises in which an arrest might take place. Cf. Chimel v. California, 395 U.S. 752 (1969) (holding that a search of premises incident to an arrest is restricted to the arrestee's immediate area). As Professor LaFave has observed, Lefkowitz "turns out upon close inspection to be of no help in answering th[e] question" of the validity of allegedly pretextual arrests. 1 W. LaFave, Search and Seizure § 1.4(e), at 91 (2d ed. 1987).

2. Petitioner contends (Pet. 13-16) that there is a conflict in federal and state cases in the treatment of pretext arrests that requires this Court's attention. The conflict, however, is considerably narrower than petitioner portrays it and does not warrant review in this case.

A majority of recent court of appeals decisions that have addressed the issue have held that objectively valid police actions cannot be challenged on the theory that they were pretextual. See, e.g., United States v. Trigg, 925 F.2d 1064 (7th Cir. 1991), petition for cert. pending, No. 91-5013; United States v. Cummins, 920 F.2d 498, 501 (8th Cir. 1990), petition for cert. pending, No. 90-1628; United States v. Causey, 834 F.2d 1179 (5th Cir. 1987) (en banc); cf. United States v. Nersesian, 824 F.2d 1294, 1315-1317 (2d Cir.), cert. denied, 484 U.S. 957 (1987); United States v. Hawkins, 811 F.2d 210, 213-215 (3d Cir.), cert. denied, 484 U.S. 833 (1987). Contrary to petitioner's suggestion (Pet. 13), no circuit is committed to the view that an objectively valid arrest can be challenged because of the officer's subjective motives.[3]

---

[3] Petitioner errs in asserting (Pet. 13) that the Ninth, Fourth, Eighth, and D.C. Circuits have applied a subjective test. The language in United States v. Smith, 802 F.2d 1119, 1124 (9th Cir. 1986), that seems to endorse a subjective approach is dictum, and relied on cases before the decision in Scott v. United States. To our knowledge no recent Ninth Circuit decision has invalidated an arrest on pretext grounds. See, e.g., United States v. Lillard, 929 F.2d 500, 502 (9th Cir. 1991) (rejecting pretext claim). The Fourth Circuit rejected a pretext claim in United States v. Corbitt, 675 F.2d 626, 628-629 (1982), solely by referring to the objective facts that validated a stop and then an arrest of the defendant. The Eighth Circuit rejected the concept of a pretext arrest in United States v. Cummins, supra. The D.C. Circuit in United States v. Whitfield, 629 F.2d 136, 139 n.5 (D.C. Cir. 1980), stated in dicta that a search undertaken for investigatory purposes could not be later justified as an inventory search, but the court never alluded to, let alone accepted, the theory that an arrest supported by probable cause could be challenged on the ground that the officer had a hidden investigatory motive.

One circuit, however, has held that "the pretextual use of police power may violate the Fourth Amendment," even where the police have observed a traffic offense that would otherwise justify a stop. In United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988), the court agreed that courts should not inquire into "the officer's subjective intent," but it concluded that "an objective analysis of the facts and circumstances of a pretextual stop is appropriate," id. at 1515, to consider "not whether the officer could validly have made the stop, but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose." Id. at 1517.[4]

---

[4] Petitioner errs in citing (Pet. 14) cases from the Eleventh and Sixth Circuits for the same proposition. In United States v. Smith, 799 F.2d 704, 708-709 (1986), the Eleventh Circuit held that a traffic stop based on reasonable suspicion could be challenged as pretextual if a reasonable officer would not have made the challenged stop absent suspicions of other illegal activity. But the court explicitly declined to address the question, which is presented in this case, of "when, if ever, a stop for probable cause resulting from an observed traffic violation might be invalid as pretextual." 799 F.2d at 709 (emphasis added). Subsequent Eleventh Circuit cases have continued to leave that issue open. See United States v. Dunkley, 911 F.2d 522, 525 (1990), cert. denied, 111 S. Ct. 765 (1991); United States v. Strickland, 937 F.2d 937, 940 (1990). The Sixth Circuit in United States v. Pino, 855 F.2d 357, 361 (1988), cert. denied, 110 S. Ct. 1160 (1990), found that because the arrest before it was valid even under the Eleventh Circuit's Smith decision, it was unnecessary to "decide the question whether, if there is adequate reason for a stop based on a traffic violation, it is necessary that it also be shown that this was in fact the reason for the stop." In United States v. Crotinger, 928 F.2d 203, 206 (6th Cir. 1991), the court believed that Pino had found the Smith analysis "useful," but it had no

The conflict in approach between the decision in this case and in Guzman does not warrant this Court's review. First, petitioner would not prevail under the test in Guzman even if it were applied in this case. The New Mexico officers observed petitioner driving with a broken tail light, in violation of state law.[5] Because unmarked patrol cars are discouraged from stopping vehicles, the officers flagged down a state trooper who was conducting radar detection and requested him to initiate the stop. 6/21/90 Tr. 50-51, 58, 61, 64. Petitioner made no showing that the state trooper's making of a routine traffic stop departed from any applicable law enforcement policies, and it strains a common-sense approach to police practice to suggest that a reasonable state trooper would have ignored petitioner's broken tail light under the circumstances. Under Guzman, a defendant must show that his stop was out of character with "general police practice" to establish a pretext claim. 864 F.2d at 1518. Petitioner's "conclusory allegations" in support of his motion to

occasion to resolve the question left open in Pino because the arrest in Crotinger was supported by probable cause and there was no evidence that the police had an ulterior motive.

[5] As the court of appeals pointed out (Pet. App. A7), petitioner did not challenge either the factual or legal basis for the traffic stop in this case. Petitioner now asserts (Pet. 11) that "there was no evidence that New Mexico law allows highway stops for broken tail lights." But Officer James Torres, a ten-year veteran of the Albuquerque police department, testified that it is a violation of state law to drive a car with defective equipment, such as a broken tail light. 6/21/90 Tr. 42, 64. Further, there is no question that New Mexico law prohibits driving with defective tail lights. 11 N.M. Stat. Ann. §§ 66-3-801, 66-3-805 (Michie 1990) (making it a misdemeanor to drive a car on a highway without two tail lamps).

suppress, Pet. App. A7, did not include a proffer of evidence of "general police practice," and he therefore cannot prevail under Guzman.[6]

Second, wholly apart from petitioner's broken tail light, the stop in this case is justified under Terry v. Ohio, 392 U.S. 1 (1968). Petitioner visited the house of a well-known narcotics dealer, which was under surveillance by Albuquerque police officers. Officer Torres testified that while petitioner was there, the officers "saw what we believed was a transaction between [petitioner] and one of the occupants of the residence." 6/21/90 Tr. 63. The officers chose to follow petitioner as a result of that observation. Id. at 43. Officer Torres also testified that he believed he had probable cause to arrest petitioner at that time, but refrained from doing so because he thought that petitioner was headed to a "stash" location. Id. at 59. In light of those facts, this case does not present a situation in which a "pretext" traffic violation provides the only legal justification for a stop of petitioner. Rather, the officers had at least reasonable suspicion that petitioner had committed a narcotics offense, and it would have been perfectly appropriate for them to conduct a brief stop of petitioner to investigate their suspicions of his drug-related activity.

[6] Petitioner's claim was also properly rejected by the district court because it was not timely presented. See note 2, supra. Although the court of appeals did not reach that issue, the facts it recited make clear that petitioner had an ample basis for raising any pretext claim well before trial, and the district court did not abuse its discretion by failing to entertain that claim when it was raised after the jury had been selected.

Accordingly, even if the broken tail light justification were regarded as pretextual, the stop of petitioner's truck did not violate his Fourth Amendment rights.

Third, the Tenth Circuit's application of Guzman indicates that it is an extremely narrow rule; to our knowledge, no pretext claim asserted under Guzman has succeeded. See, e.g., United States v. Neu, 879 F.2d 805, 808 (10th Cir. 1989) (rejecting pretext claim where a reasonable officer would have made a traffic stop after the defendant abruptly slowed down while being followed); United States v. Erwin, 875 F.2d 268, 272 (10th Cir. 1989) ("a reasonable New Mexico patrol officer routinely would have stopped a vehicle traveling twelve miles over the speed limit even in the absence of the alleged illicit motive"); United States v. Rivera, 867 F.2d 1261, 1263-1264 (10th Cir. 1989) (rejecting claim that traffic stop leading to drug seizure was pretextual because state police had "working arrangements" with federal narcotics agents and had previously made similar stops and seizures). In light of the narrowness with which Guzman has been applied, and the fact that no other circuit has extended it to an arrest based on probable cause, review is not warranted to resolve the tension between Guzman and the rule applied in other circuits.

Nor do the state cases cited by petitioner (Pet. 15-16) suggest the existence of a more widespread conflict that would justify this Court's intervention. Most of the state courts that have addressed the issue agree with the approach adopted by the

court of appeals in this case.[7] Although a handful of state cases have applied a form of pretext analysis, those cases involved distinguishable facts, and none of the state cases petitioner cites creates a square conflict with the decision in this case.[8] Even if there is some disagreement in the state courts over the appropriate role, if any, of the notion of a pretextual arrest, that disagreement does not require this Court's review of petitioner's claim.

---

[7] See Pet. 15; see also State v. Garcia, 794 S.W.2d 472, 477-478 (Tex. Crim. App. 1990); People v. Sorrells, 209 Ill. App. 3d, 568 N.E.2d 497 (4th Dist. 1991); State v. Olaiz, 100 Or. App. 380, 786 P.2d 734 (1990); Commonwealth v. Jones, 578 A.2d 527 (Pa. Super. 1990); Bosworth v. Commonwealth, 375 S.E.2d 756 (Va. App. 1989); State v. Mann, 103 N.M. 660, 712 P.2d 6 (Ct. App. 1985).

[8] In Hines v. State, 289 Ark. 50, 55-56, 709 S.W.2d 65, 68 (1986), the court found no pretext violation because the arrest for criminal mischief would have occurred even without the officer's suspicions regarding a recent murder. In Brown v. State, 738 P.2d 1092, 1095 (Wyo. 1987), the court found that an arrest of the defendant in her home on a two-year-old traffic warrant, together with a subsequent protective sweep, was a pretext for a narcotics investigation. Although relying principally on the pretext argument, the court also noted that the State "did not even establish the validity of the arrest," and "[n]o warrant appears in the record." Id. at 1096. In State v. Blair, 691 S.W.2d 259 (Mo. 1985), cert. dismissed, 480 U.S. 689 (1987), the defendant was ostensibly arrested on a traffic warrant but was immediately held in custody and booked on homicide charges. The pretext rationale was only an alternative ground for decision, and the court distinguished the case before it from a case in which the defendant commits a traffic offense in the presence of police officers, where any citizen would be stopped in ordinary police routine. Id. at 263. None of those cases, if applied to the facts of this case, would require the suppression of the evidence obtained as a result of the stop of petitioner's truck by a New Mexico trooper for an observed broken tail light.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney

AUGUST 1991

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

No. 91-5087 (4)

Supreme Court, U.S.
FILED
SEP 12 1991
OFFICE OF THE CLERK

DISTRIBUTED
SEP 19 1991

In The

Supreme Court of the United States

October Term, 1991

MARIO ENRIQUEZ-NEVAREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

LUCIEN B. CAMPBELL
Federal Public Defender
Western District of Texas
727 E. Durango Blvd., B-207
San Antonio, Texas 78206
(512) 229-6700

Counsel of Record for Petitioner

HENRY J. BEMPORAD
Assistant Federal Public Defender
Western District of Texas

RECEIVED
SEP 16 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

25 pp

No. 91-5087

In The

Supreme Court of the United States

October Term, 1991

MARIO ENRIQUEZ-NEVAREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

Pursuant to Supreme Court Rule 15.6, Petitioner Mario Enriquez-Nevarez, files this Reply to the Brief for the United States of America in Opposition to Petitioner's Petition for Writ of Certiorari.

INTRODUCTION

Before the district court, Petitioner claimed that New Mexico detectives had stopped the truck he was driving on a pretextual basis: while the detectives stated that the truck was stopped because of a broken tail light, it was actually stopped with the improper intent to search for evidence of a crime. The district court refused Petitioner a hearing on the motion, on the ground that, under *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987) (en banc) there was "no more pretext stop law" in the Fifth Circuit. Pet. App. B. Although Petitioner argued that Fifth Circuit precedent on pretextual seizure law did not foreclose his motion, the court of appeals affirmed. It held that "the district court correctly applied *Causey* and did not abuse its discretion in failing to conduct a hearing on the motion." Pet. App. A, at 7.

Petitioner has now requested that this Court grant certiorari on the following question:

> Whether a pretextual traffic stop—*i.e.*, a stop made under facially legal authority but with the improper intent to search for evidence—is *per se* reasonable under the Fourth Amendment.

Pet. at *i*. In response, the Government asserts that the question presented by Petitioner "does not raise a conflict calling for this Court's review," Brf. in Opp. at 5; further, it contends that Petitioner's motion was properly denied because it was untimely and because the agents had reasonable suspicion to stop the truck under the test enunciated in *Terry v. Ohio*, 392 U.S. 1 (1968). Because Petitioner has already fully addressed the state of pretextual stop law in the lower courts, he replies briefly only to the latter two arguments.

ARGUMENT

In support of its opposition to the petition, the Government relies on two grounds not reached by the court of appeals: (1) that Petitioner's motion was untimely; and (2) that the officers' actions were based upon a reasonable articulable suspicion, derived from facts other than the broken taillight for which the truck was ostensibly stopped. For the reasons set out below, these contentions have no merit.

I. PETITIONER'S MOTION WAS TIMELY.

In a footnote, the Government asserts that Petitioner's motion was properly denied without a hearing because it was not timely presented. Brf. in Opp. at 11 n.6. This assertion apparently relies upon an earlier footnote in the Government's brief, in which the Government claims that "petitioner clearly knew of the stop well before trial, and the government had indicated two months earlier that it intended to present evidence about the stop," and that "petitioner could have filed a timely motion if he had conducted an investigation." Brf. in Opp. at 4-5 n.2. The court of appeals also noted the existence of this issue, but it expressly declined to reach the question of whether the motion was timely. Pet. App. A at 7-8 n.2.

The Government's assertions ignore the actual proceedings in the case. Petitioner's motion to suppress was based on information contained in a detective's notes, disclosed by the Government on the afternoon before trial. These notes, which were disclosed in accordance with the requirements of the Jencks Act, 18 U.S.C. § 3500, indicated for the first time that (1) Albuquerque detectives had initiated the stop, rather than the New Mexico State Police; and (2) that Petitioner had made statements during the stop.[1] The court of appeals noted that the Government had mentioned the stop in a response to Petitioner's motion to sever on April 10, 1990. Pet. App. A at 7 n.2. The response, however, did not explain the circumstances of the search of the vehicle, nor did it mention that Petitioner had made statements at the time.[2] Indeed, the Government's failure to disclose Petitioner's statements was in direct contravention to the discovery order entered in the case. The standing discovery order, filed on February 16, 1990, required that "within seven (7) days from the date" the order is entered:

> The government shall permit the defendant to inspect and copy the following items or copies thereof, or supply copies thereof which are within the possession, custody or control of the government, the existence of which is known or by the exercise of diligence may become known to the government.
>
> (1) Written or recorded statements made by the defendant.
>
> (2) The substance of any oral statement made by the defendant before or after his arrest in response to interrogation by a person then known to be a government agent which the government intends to offer in evidence at trial.[3]

Thus, the lateness of the motion to suppress resulted in part from the Government's failure to comply with the district court's discovery order.

With regard to the claim that defense counsel failed to exercise due diligence in investigating the circumstances of the stop, it is clear that no amount of diligence would have necessarily led to the discovery that the New Mexico stop was supervised by the Albuquerque detectives and effected for pretextual reasons. The only sources of information regarding the real motivation for the stop were the detectives and their notes. The detectives were under no requirement to discuss the case with the defense; moreover, their notes were required to be disclosed only if they testified at trial. 18 U.S.C. § 3500(b). Until trial, "no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be subject to subpoena, discovery, or inspection." 18 U.S.C. § 3500(a). Given the limits placed upon defense counsel by statute, and the Government's failure to disclose Petitioner's statements in accordance with the discovery order, it is disingenuous for the Government to assert that documents in its possession were discoverable by the defense prior to their release on the eve of trial. This Court should not rely on the asserted untimeliness of Petitioner's motion as a ground for refusing to review his claim, especially where the court of appeals did not.

---

[1]The notes are attached to this reply as Addendum A.

[2]The response to the motion to sever is attached to this reply as Addendum B.

[3]The order is attached to this reply as Addendum C.

II. THE STOP OF THE TRUCK WAS NOT SUPPORTED BY REASONABLE SUSPICION INDEPENDENT OF THE PRETEXTUAL TRAFFIC VIOLATION.

The Government also asserts that, "wholly apart from petitioner's broken tail light, the stop in this case is justified under *Terry v. Ohio*, 392 U.S. 1 (1968)." Brief in Opposition at 11. This issue was not reached by either the district court or the court of appeals, and it provide no basis for denying certiorari in this case.

The Government relies on the court of appeals' opinion for its assertion that, while maintaining surveillance on the residence of a "known narcotics trafficker," the detectives "saw petitioner engage in what they believed was a narcotics transaction with an occupant of Montoya's residence." Brf. in Opp. at 2 (citing Pet. App. A at 2). However, the court of appeals noted only that "Enriquez went to the residence." Pet. App. A, at 2. Moreover, the agent's testimony, on which the Government relies in making its *Terry* argument, was limited to the statement that the agents saw "what [they] believed was a transaction between Enriquez and one of the occupants of the residence."[4] See Brf. in Opp. at 11. No drugs were seen by the agents, thus leaving it to speculation as to what sort of "transaction" took place.

Even if it can be inferred that the agents had reason to that suspect an illegal transaction had occurred, however, this would not support the stop. Any suspicion the agents might have had evaporated when Petitioner did not go to a reputed "stash" location thirty miles outside of town, as expected, but instead travelled further south. See Pet. App. A. at 2. Nevertheless, the agents continued to follow Petitioner, stopping him after following "for about sixty or seventy miles." *Id.* at 3. The record reveals no reason for this continued surveillance; moreover, the detective's notes clearly indicate that the "vehicle was stopped for having a broken tail light," not for the reasons supplied by the Government for the first time in its response to the petition for certiorari. For all

[4]This portion of the agent's testimony is attached as Addendum D to this reply.

these reasons, *Terry* cannot be invoked to justify the agents' actions, and certainly not at this late hour.

The court of appeals held, and the Government asserts, that Petitioner's conclusory allegations as to the pretextual nature of the stop did not entitle him to relief. Pet. App. A. at 7; Brf. in Opp. at 10–11. This is erroneous. Petitioner supplied the district court with the detective's notes, which clearly showed that the traffic stop was pretextual. Thus, for Petitioner to have been properly denied a hearing, it was necessary for the district court and the court of appeals to conclude that pretextual stops are *per se* reasonable under the Fourth Amendment. The lower courts' conclusion reflects an incorrect reading of the requirements of the Constitution, and Petitioner asks the Court to grant certiorari to review this important issue.

CONCLUSION

For the foregoing reasons, and for those reasons set out in the Petition for Certiorari, the Court should grant review by certiorari.

Respectfully submitted.

LUCIEN B. CAMPBELL
Federal Public Defender
Western District of Texas
727 E. Durango Blvd., B-207
San Antonio, Texas 78206
(512) 229-6700

Counsel of Record for Petitioner

HENRY J. BEMPORAD
Assistant Federal Public Defender

ADDENDUM A

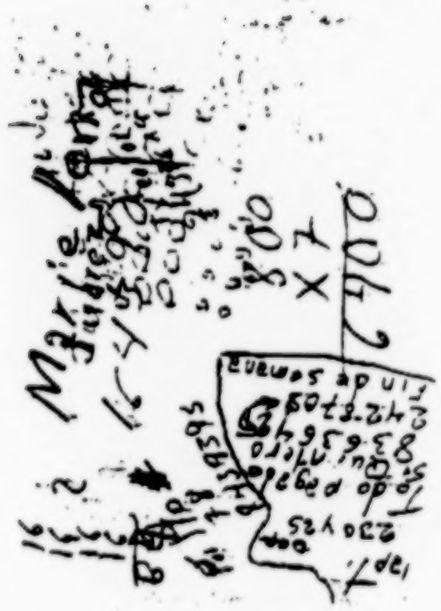
DETECTIVE'S NOTES, FILED AS AN EXHIBIT
TO PETITIONER'S MOTION TO SUPPRESS
OR MOTION IN LIMINE C,
JUNE 21, 1990

G.I. STATEMENT/NOTES + PAPERS
RECOVERED FROM TRASH

① Detectives observed the vehicle traveling southbound on Interstate 25.
② A state police officer was flagged down for assistance. Vehicle was stopped for having a broken tail light
③. Both subjects were asked to exit the truck. Detective Torres explained why they were stop Detective showed them the detective light
④. Both subjects asked why detectives were at that location... Enriquez was advised that w had information that he had a load of meth and that he sold alot of cocaine is Alb.
⑤ Enriquez advised that people don't take drug to Mexico, but that they [redacted] from the
⑥ Subjects claimed they were going to Juarez for bottled cokes and a bumper for his newly painted truck
⑦ Enriquez was asked for permission to search his truck. He agreed to allow detectives to search was fruitless
⑧ During the search of the truck detectives observed a New Mexico truck plate under the seat
⑨ Both subject agreed to a search of their body - Castillo appeared to be nervous while detective spoke to them

1415 Hrs
Blue Van at
Richard Montoyas
on Bethel
Possible Exchange
Lots of People (NMA)
1445 Hrs
Blue Van
Goes to Englewood

1513 Hrs
Blue Van
Goes to Hacienda
Motel Back
S.E. Corner



Lost in traffic
Blue Truck (Possible traffic)
following Van

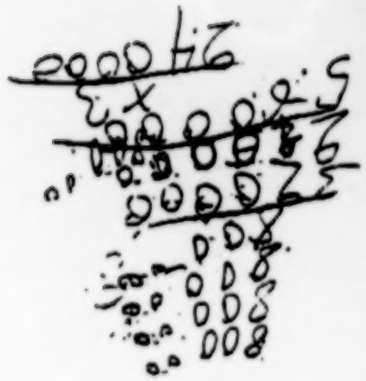
1613 Hrs
Blue Van +
Truck arrive at
Englewood.

1632 Hrs
Taking Holding
N.M. Plate gets
into truck w/other
NMA in Cowboy Hat
1637 Hrs

[redacted]
1817 Hrs
Flag Down State
Police Vehicle
Stopped for No
Tail Light Vehicle
Searched Neg Results
Ident Plate # 115347
N.M. Plate in
Vehicle NM 444-620

1415 Hrs
Blue Van at
Richard Montoyas
on Bethel
Possible Exchange
Lots of People (NMA)
1445 Hrs
Blue Van
Goes to Englewood

1513 Hrs Blue Van
Goes to Hacienda
Motel Back
S.E. Corner



(9)

Knocks - No answer
Possibly #7

1522
Blue Van
at D.I. Lounge
Picks up S.M.A.
W/cowboy Hat

Blue Van leaves
Lost in traffic

1550 Hrs
Van found at

[redacted]
1817 Hrs
Flag Down State
Police Vehicle
Stopped for No
Tail Light Vehicle
Searched Neg Results
Ident Plate # 115347
N.M. Plate in
Vehicle NM 444-620

ADDENDUM B

GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION TO SEVER,
APRIL 10, 1990.

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION '90

CLERK, U.S. DISTRICT CLERK
BY _____
DEPUTY

UNITED STATES OF AMERICA,

Plaintiff,

V.

RIGOBERTO CASTILLO-OLIVAS, and MARIO ENRIQUEZ-NEVAREZ,

Defendants.

EP-90-CR-53(H)

FEDERAL PUBLIC DEFENDER
RECEIVED
APR 11 1990
WESTERN DIST. OF TEXAS
EL PASO, TEXAS

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO SEVER

Comes now the United States of America, by the United States Attorney for the Western District of Texas, Ronald F. Ederer, and Assistant United States Attorney Guy Till, and hereby files the Government's Response to the Defendant's Motion to Sever, filed in the above numbered and styled case.

I.

STATEMENT OF FACTS

On January 31, 1990, Defendants, Mario Enriquez-Nevarez and Rigoberto Castillo-Olivas, entered the United States in two trucks. Mr. Enriquez-Nevarez was referred to secondary inspection because he was alone in the truck (the truck had Idaho plates), and Mr. Enriquez apparently had no luggage.

Mr. Castillo-Olivas became extremely nervous when questioned by Inspector Rodriguez. Mr. Castillo-Olivas stated he had been in Mexico for one day to visit relatives and the truck belonged to a friend. After tapping the gas tank and hearing a dull thud, Inspector Rodriguez took Mr.

Castillo-Olivas into the Customs head-house. Mr. Castillo-Olivas was patted down for any weapons. Inspector Rodriguez asked Mr. Castillo-Olivas if he was travelling alone. Mr. Castillo-Olivas replied that the driver of the truck with Idaho plates in secondary inspection was travelling with him.

Shortly afterward, Inspector Cordero asked Mr. Castillo-Olivas who owned the truck he was driving. Mr. Castillo-Olivas replied that the truck belonged to Mr. Enriquez-Nevarez. Inspector Cordero asked where Mr. Enriquez-Nevarez was, and Mr. Castillo-Olivas replied that Mr. Enriquez-Nevarez was with the pickup truck with Idaho plates in the secondary inspection area. Mr. Castillo-Olivas further stated to Inspector Cordero that the purpose of their trip to Mexico was to pick up the pickup driven by Mr. Castillo-Olivas. Inspector Cordero detained Mr. Enriquez-Nevarez.

The truck being driven by Mr. Castillo-Olivas was registered to a Luz E. Montano of Farmington, New Mexico 87499. Mr. Castillo-Olivas had a Certificate of Title in his possession. Also recovered was a New Mexico traffic ticket issued to Mr. Enriquez-Nevarez on January 30, 1990 on Interstate Highway 25 at Mile Post 152.

After his arrest, Mr. Castillo-Olivas made a statement in which he related that he had known Mr. Enriquez-Nevarez for about ten (10) years. Mr. Castillo-Olivas said that Mr. Enriquez-Nevarez invited Mr. Castillo-Olivas to come to Juarez and pick up a truck that belonged to Mr. Enriquez-Nevarez. According to Mr. Castillo-Olivas, the two men were stopped by the New Mexico State Police on the way down to Mexico on January 30, 1990, and the truck was then searched by plainclothes police officers. Mr. Castillo-Olivas said he became suspicious of the trip after the truck was searched, but continued on with the trip because he had no independent way to get home.

II.

CITATION OF AUTHORITIES AND ARGUMENT

The Defendants are charged with conspiracy. Bruton v. United States, 391 U.S. 123 (1968), held that a co-defendant's post-conspiracy confession implicating another defendant is inadmissible unless the co-defendant testifies. The Bruton Rule does not apply to statements made during the course of a conspiracy, United States v. Mitchell, 556 F.2d 371 (6th Cir.), cert. denied, 434 U.S. 925 (1977) or to a confession at joint trial of a co-defendant which does not inculpate the accused. See United States v. Louderman, 576 F.2d 1383 (9th Cir. 1978), or to a confession from which references to the other accused have been redacted. See United States v. Stewart, 579 F.2d 356 (5th Cir.), cert. denied, 439 U.S. 936 (1978).

In the present case, Mr. Castillo-Olivas' initial explanation to Inspector Rodriguez, during which Mr. Castillo-Olivas said the truck belonged to a friend, took place before Mr. Castillo-Olivas was arrested, during routine U.S. Customs questioning. See United States v. Bengivenga, 845 F.2d 593,596 (5th Cir. 1988), cert. denied, _____ U.S. _____, 109 S.Ct. 306 (1988); United States v. Harrell, 894 F.2d 120 (5th Cir. 1990). Mr. Castillo-Olivas' first remarks to Inspector Rodriguez are admissible because the remarks were made during the course of the conspiracy and in furtherance of the conspiracy. Additionally, Mr. Castillo-Olivas' first set of remarks are admissible because they referred to "a friend" rather than Mr. Enriquez-Nevarez.

After Mr. Castillo-Olivas was detained in the head-house, Mr. Castillo-Olivas made statements referring to Mr. Enriquez-Nevarez to Inspector Cordero and later to the U.S. Customs Special Agent investigating the case. The Government proposes and represents to the Court that the Government's witnesses at trial during the Government case-in-chief will be instructed not to repeat Mr. Castillo-Olivas' specific references to Mr. Enriquez-Nevarez only as "a friend" of Mr. Castillo-Olivas. The Government proposes to present testimony about the events in New Mexico on Interstate Highway 25 through a member of the New Mexico State Police. The proposed method of redaction will satisfy the requirements of Bruton, supra. See Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987) (Bruton applies to

facially incriminating confessions - not to statements where the incriminating character of the statement becomes clear after evidentiary linkage, Richardson, supra, at 208-209.)

III.

CONCLUSION

The Government respectfully asks the Court to deny the Defendant's Motion to Sever on the grounds that the requirements of Bruton, supra, will be satisfied by eliminating direct references to Mr. Enriquez-Nevarez from the statements attributed to the co-defendant, Mr. Castillo-Olivas, during the Government's case-in-chief. See Richardson, supra.

Respectfully submitted, this 10th day of April, 1990.

RONALD F. EDERER
UNITED STATES ATTORNEY

By: GUY TILL
Assistant U.S. Attorney
U.S. Attorney's Office
Colorado Bar No. 7854
511 E. San Antonio
El Paso, Texas 79901
(915) 534-6884

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 1990, a copy of this Motion was mailed to:

(1) Robert Perez, Assistant Federal Public Defender, 700 E. San Antonio, El Paso, Texas 79901.
(2) Ricardo Gonzalez, Attorney at Law, 4621 Pershing, El Paso, Texas, 79903.
(3) U.S. Customs Service Special Agent Michael Powers, Office of Enforcement, 6501 Boeing, Building G, El Paso, Texas 79925.

GUY TILL
Assistant U.S. Attorney

F. The government shall state whether the defendant was the subject of any electronic surveillance, and, if so, shall furnish to defense counsel for inspection and copying any recordings or videotapes which may be offered in evidence at the trial.

G. The government shall cause to be transcribed the grand jury testimony of all witnesses who will testify for the government at the trial of this cause so that their statements can be furnished to defendant pursuant to 18 U.S.C. § 3500.

It shall be the continuing duty of counsel for both sides to reveal to opposing counsel all newly discovered information or other material within the scope of this Standing Order.

The Court may at any time, upon motion properly filed, order that the discovery or inspection provided for by this Standing Order be denied, restricted or deferred, or make such other order as is appropriate. It is expected by the Court, however, that counsel for both sides shall make every good faith effort to comply with the letter and spirit of this Standing Order.

All motions concerning matters not covered by this Standing Order must be filed within ten (10) days of arraignment or waiver of arraignment.

SIGNED AND ENTERED this 16th day of February, 19 90.

HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

ADDENDUM C

DISTRICT COURT'S STANDING DISCOVERY ORDER,
FEBRUARY 16, 1990

RJP

2/16/90

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

FEDERAL PUBLIC DEFENDER
RECEIVED
FEB 22 1990
WEST. DIST. OF TEXAS
EL PASO, TEXAS

UNITED STATES OF AMERICA)
)
v.) EP- 90 CR- 53-H (2)
)
MARIO ENRIQUEZ-NEVAREZ)

STANDING DISCOVERY ORDER

On this day came on to be considered the above-styled and numbered cause. It appears to the Court that, to expedite discovery and bring about full readiness for trial by all parties at the earliest possible date, the following Order should be entered.

It is therefore ORDERED that the parties herein confer and accomplish the following matters within seven (7) days from the date of this Order:

A. The government shall permit the defendant to inspect and copy the following items or copies thereof, or supply copies thereof which are within the possession, custody or control of the government, the existence of which is known or by the exercise of diligence may become known to the government.

(1) Written or recorded statements made by the defendant.

(2) The substance of any oral statement made by the defendant before or after his arrest in response to interrogation by a person then known to be a government agent which the government intends to offer in evidence at trial.

(3) Recorded grand jury testimony of the defendant relating to the offenses charged.

(4) The defendant's F.B.I. arrest record.

(5) Books, papers, documents, photographs, tangible objects, buildings or places which the government intends to use as evidence at trial to prove its case in chief, or which were obtained from or belong to the defendant.

(6) Results of reports of physical or mental examinations, and of scientific tests or experiments, made in connection with this case.

B. The defendant shall permit the government to inspect and copy the following items or copies thereof, or supply copies thereof which are within the possession, custody or control of the defendant, the existence of which is known or by the exercise of diligence may become known to the defendant.

(1) Books, papers, documents, photographs or tangible objects which the defendant intends to introduce as evidence in chief at the trial.

(2) Any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case which the defendant intends to introduce as evidence in chief at trial or which were prepared by a defense witness who will testify concerning the contents thereof.

(3) If a defendant intends to rely upon the defense of insanity at the time of the alleged crime or intends to introduce expert testimony relating to a mental disease, defect or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall given written notice thereof to the government.

C. The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of Brady v. Maryland, 373 U.S. 83 (1963), or which would tend to impeach government witnesses.

D. The government shall disclose to the defendant the existence and substance of any payments, promises of immunity, leniency, or preferential treatment, made to prospective government witnesses, within the scope of United States v. Giglio, 405 U.S. 150 (1972) and Napue v. Illinois, 360 U.S. 264 (1959).

E. The government shall supply the defendant with an F.B.I. rap sheet or other appropriate record of prior convictions of any government witness who is known to have a prior criminal record.

ADDENDUM D

EXCERPT OF TRIAL TESTIMONY,
JUNE 21, 1990

IN THE UNITED STATES DIS ICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	NO. EP-90-CR-53H
VS.	Trial Proceedings
RIGOBERTO CASTILLO-OLIVAS MARIO ENRIQUEZ-NEVAREZ	June 21, 1990

Volume 1

Appearances:

For the Government:	Francisco Macias Assistant U. S. Attorney United States Courthouse El Paso, Texas 79901
For Rigoberto Castillo-Olivas	Ricardo D. Gonzalez Attorney at Law 4621 Pershing Drive El Paso, Texas
For Mario Enriquez-Nevarez	Robert Perez Assistant Federal Public Defender Federal Building El Paso, Texas 79901
Court Reporter:	Chris Carpenter 439 U.S. Courthouse El Paso, Texas

The above styled and numbered cause came on for trial before the Honorable Harry Lee Hudspeth, Judge presiding, with a jury, on June 21, 1990, commencing at 9:00 in the morning, in courtroom number 1, United States Courthouse, El Paso, Texas.

we marked it down as number 7 -- and did you write down in your own notes that the search was fruitless?

A. Yes, sir.

MR. PEREZ: I have no further questions, Your Honor.

THE COURT: Any cross?

MR. MACIAS: Yes, sir.

THE COURT: I didn't call on you yet. Wait for your turn at bat.

MR. GONZALEZ: No questions, Your Honor.

THE COURT: You may do you redirect after all.

MR. MACIAS: Thank you, Your Honor. Sorry about that.

R E-D I R E C T E X A M I N A T I O N

BY MR. MACIAS:

Q. (By Mr. Macias) Officer, would you tell us who is "Montoya"?

A. Richard Montoya is a known narcotics smuggler to us, sir.

Q. Why did you follow the defendant?

A. We saw what we believed was a transaction between Enriquez and one of the occupants of the residence, sir.

Q. Would you tell the ladies and gentlemen of the jury what prior information you had about --

MR. PEREZ: Objection, Your Honor.

THE COURT: Sustained.

Q. (By Mr. Macias) Now, when he asked you to -- or when

FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF TEXAS

LUCIEN B. CAMPBELL
FEDERAL PUBLIC DEFENDER

San Antonio

FEDERAL BUILDING-HEMISFAIR PLAZA
727 EAST DURANGO BOULEVARD, B-207
SAN ANTONIO, TEXAS 78206-1203
TELEPHONE
(512) 229-6700
(FTS) 730-6700

FEDERAL BUILDING
700 E. SAN ANTONIO, D-401
EL PASO, TEXAS 79901-7001
TELEPHONE
(915) 534-6525
(FTS) 570-6525

September 12, 1991

Mr. William K. Suter
Clerk, Supreme Court
of the United States
1 First Street, NE
Washington, D.C. 20543

RE: **Mario Enriquez-Nevarez**
v.
United States of America
No. 91-5087

Dear Mr. Suter:

Enclosed herewith for filing are an original and nine copies of the Reply Brief of Petitioner in the above-referenced cause.

By copy of this letter we are mailing two copies of the Reply to the Honorable Kenneth W. Starr, Solicitor General of the United States, Department of Justice, Washington, D.C. 20543; and a copy to Mrs. LeRoy Morgan Jahn, Assistant United States Attorney, Western District of Texas, 727 E. Durango Boulevard, A-601, San Antonio, Texas 78206.

Thank you for your attention to this matter.

Very truly yours,

Lucien B. Campbell
Federal Public Defender

Henry J. Bemporad
Assistant Federal Public Defender

HJB/mel
Enclosure
cc: Honorable Kenneth W. Starr
Mrs. LeRoy Morgan Jahn
Mr. Mario Enriquez-Nevarez

RECEIVED
SEP 16 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

90–1628 (3) GREGORY LYNN CUMMINS
v.
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

91–5013 (4) WILLIAM TRIGG
v.
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

91–5087 (5) MARIO ENRIQUEZ-NEVAREZ
v.
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 90–1628, 91–5013, AND 91–5087. Decided November 12, 1991

The petitions for writs of certiorari are denied.

JUSTICE WHITE, dissenting.

In each of these cases, the petitioner has alleged that police used a traffic stop as a pretext for conducting a narcotics search. Gregory Cummins was stopped after he failed to proceed through an intersection when the traffic light turned green. *United States* v. *Cummins*, 920 F. 2d 498 (CA8 1990). William Trigg was arrested for driving with a suspended license. *United States* v. *Trigg*, 925 F. 2d 1064 (CA7 1991); *United States* v. *Trigg*, 878 F. 2d 1037 (CA7 1989). Mario Enriquez-Nevarez was pulled over after officers observed that his truck had a broken tail light. *United States* v. *Enriquez-Nevarez*, 931 F. 2d 890 (CA5

1991) (table). Each search led to the recovery of illegal drugs.

The Courts of Appeals for the Eighth, Seventh, and Fifth Circuits held that, because a reasonable police officer *could* have made the traffic stops, the evidence produced by the searches was admissible. See also *United States* v. *Causey*, 834 F. 2d 1179 (CA5 1987) (en banc). Cf. *United States* v. *Nersesian*, 824 F. 2d 1294 (CA2), cert. denied, 484 U. S. 958 (1987); *United States* v. *Hawkins*, 811 F. 2d 210 (CA3), cert. denied, 484 U. S. 833 (1987). The petitioners contend that the evidence should have been suppressed because no reasonable police officer *would* have made such traffic stops and hence the stops were pretexts to investigate other crimes for which there were not grounds to stop. See *United States* v. *Guzman*, 864 F. 2d 1512 (CA10 1988); *United States* v. *Smith*, 799 F. 2d 704 (CA11 1986).

In recent months, this Court has denied review of at least two other cases raising pretextual search claims. See, *e. g.*, *Anderson* v. *Illinois*, ___ U. S. ___ (1991); *Hope* v. *United States*, ___ U. S. ___ (1991). I would grant certiorari to address this recurring issue and to resolve the split in the Courts of Appeals.